

IN THE CIRCUIT COURT OF OHIO COUNTY
WHEELING, WEST VIRGINIA

IN RE:

TOBACCO LITIGATION CASE NO. 00-C-6000
MEDICAL MONITORING CASES

* * *

JURY TRIAL

Whereupon the above-entitled matter came on for
hearing before the Honorable Arthur M. Recht at the
Ohio County Courthouse, Wheeling, West Virginia, and
the proceedings are as follows.

* * *

VOLUME 10-B

October 1, 2001

1:00 p.m.

* * *

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20

21 (There are other counsel representing interested
22 parties also present in the courtroom gallery.)

23

24

2523

1 Monday Afternoon Session

2 October 1, 2001

3 1:00 p.m.

4 -- -- --

5 P R O C E E D I N G S

6 -- -- --

7 (In open court with a jury present.)

8 THE COURT: Be seated, please. Mr. Newbold, do
9 you want to continue?

10 MR. NEWBOLD: Yes, Your Honor.

11 -- -- --

12 JULIUS RICHMOND,
13 being previously duly sworn by the Clerk, testifies
14 and says as follows:

15 -- -- --

16 CROSS-EXAMINATION (Con't)

17 BY MR. NEWBOLD:

18 Q. Good afternoon, Dr. Richmond.

19 A. Good afternoon.

20 Q. Dr. Richmond, I would like to go back to
21 medical monitoring, if I might, for just a minute
22 and talk a little bit more about the National Cancer
23 Institute. When we were talking this morning, we
24 were talking about the inherent delay in a public

2524

1 health organization coming to the right decision
2 about whether or not to recommend screening
3 procedures. Do you recall that, sir?

4 A. Yes.

5 Q. And at that time we were talking about the
6 fact that, in our open society here in America, that
7 we have to get everybody's viewpoint, listen to
8 everybody, and sometimes that takes a while?

9 A. That's correct.

10 Q. There is another part of the delay, as
11 well, isn't there, sir, that's the clinical trials
12 and the scientific tests that have to be conducted
13 before the NCI or any public health organization
14 makes a decision as to whether or not to recommend
15 screening tests?

16 A. Yes, that's part of the process.

17 Q. That's part of the process is all the
18 science that has to go on; is that correct, sir?

19 A. That's correct.

20 Q. And you are aware, sir, that the National
21 Cancer Institute supports a board of editors who
22 maintain cancer information and screening
23 information for the medical profession. Am I
24 correct about that, sir?

2525

1 A. That's correct.

2 Q. And it's true, is it not, that this
3 screening and prevention board meets six times a
4 year, every other month, to update information on
5 cancer screening, early detection, and the
6 prevention of cancer; is that correct, sir?

7 A. Well, I don't know about the precise
8 intervals, but they meet frequently, yes.

9 MR. NEWBOLD: Would you put up Tab 48, please.
10 Your Honor, may I move that easel?

11 THE COURT: Sure.

12 BY MR. NEWBOLD:

13 Q. This is the PDQ screening and prevention
14 editorial board, which comes off of their internet
15 site. And it says:

16 Members of this board represent the
17 fields of oncology, cancer prevention,
18 statistics, epidemiology and economics. The
19 screening and prevention board currently meets
20 six times a year to write and update
21 information on cancer screening, early
22 detection, and prevention of cancer;

23 Is that correct, sir?

24 A. That's correct.

1 Q. So they are not just sitting on their hands
2 and talking and going on vacation; they are meeting
3 every other month to try to keep current to make the
4 best and fastest recommendations that they can; is
5 that correct, sir?

6 A. That's correct.

7 Q. Okay. Let's be really clear about this.
8 The National Cancer Institute as part of our United
9 States government; they are not hired by the tobacco
10 companies, are they?

11 A. No. It's an agency of the United States
12 Public Health Service.

13 Q. In fact, the National Cancer Institute has
14 been in the forefront of trying to get people to
15 quit smoking and to -- and do all the various
16 necessary things to educate the public; is that
17 correct, sir?

18 A. Well, no. They are the research arm of the
19 Public Health Service, and they put out scientific
20 information. They are not advocates in the usual
21 sense.

22 Q. You are familiar -- well, they put out
23 scientific information?

24 A. That's correct.

1 Q. In other words, they sponsor scientific
2 studies and trials to make sure that screening tests
3 and methods are the right thing to do?

4 A. That's correct.

5 Q. Okay. And you are familiar, actually, the
6 NCI has a division called the Early Detection
7 Research Group, which is part of the NCI's Division
8 of Cancer Prevention; are you aware of that?

9 A. Yes.

10 Q. Okay. And you are aware that the -- this
11 particular group deals specifically with the early
12 detection of cancer. That's what they do; right?

13 A. That's correct.

14 Q. All right. And so they manage and support
15 clinical trials of early detection related to
16 prostate, lung, colon and ovarian and other types of
17 cancers, trying to figure out whether or not these
18 screening tests are good or bad; is that correct,
19 sir?

20 A. That's correct. But not all of the work
21 goes on in the National Cancer Institute. The
22 National Cancer Institute makes grants to
23 universities, and all of them are doing similar
24 work, and they may be in advance of where the staff

1 of where the NCI are; that is, people in the
2 universities.

3 Q. They are the ones that fund some of these
4 studies, hire some of these studies to be done,
5 collect the data, and publish the results, and
6 ultimately make a recommendation; is that correct,
7 sir?

8 A. Well, yes, the institute, itself, does:

9 Q. All right.

10 A. Not the group, not the early cancer
11 detection group alone.

12 Q. But the NCI is part of that; isn't that

13 correct, sir?
14 A. No. It's part of the NCI.
15 Q. Right. That's what I mean. I'm sorry,
16 sir.
17 Now, you are aware, are you not, that the NCI
18 right now is implementing a lung screening study to
19 determine whether or not helical CTs are the thing
20 to do for the early detection of lung cancer. Are
21 you familiar with that, sir?
22 A. That's correct. But they are doing it
23 after some university groups have already explored
24 these efforts.

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1 Q. But my question is, right now, they are
2 undergoing a very significant study, the NCI, a
3 public health organization, to determine whether or
4 not this is the right thing to do?
5 A. They have just concluded that, the
6 preliminary study.
7 Q. I think that they have -- it's ongoing, but
8 let's take a look --
9 A. No. In August, 2001, they should have been
10 writing up their results.
11 MR. NEWBOLD: Let's see Tab 59, please.
12 THE COURT: Just move the microphone just a
13 little bit.
14 THE WITNESS: I'm sorry.
15 THE COURT: That's okay.
16 BY MR. NEWBOLD:
17 Q. Okay. This is from the CancerNet -- could
18 you blow that up, please? -- screening for lung
19 cancer, screening/detection, health professionals.
20 And can you show me the date on this, please.
21 Take a look at the bottom of the page there.
22 No, that's not -- that's the internet date.
23 This is a July, 2001 article.
24 MR. NEWBOLD: David, where is that on there?

2530

1 Oh, I have got it. Turn to the last page.
2 BY MR. NEWBOLD:
3 Q. Okay. Date last modified. So this is a
4 publication from the NCI of July of 2001.
5 MR. NEWBOLD: Now, if you would go to Page 5,
6 Jason, first paragraph.
7 BY MR. NEWBOLD:
8 Q. This is what the NCI is saying in July of
9 2001.
10 There are intensive efforts to improve
11 lung cancer screening with newer technologists,
12 for example, low radiation dose computed
13 tomography, and molecular techniques which,
14 although promising, have not been validated in
15 large controlled studies. Helical computed
16 tomography, spiral CT, is a new modality of a
17 potential use in screening. Lack of
18 appropriate mortality data and the high
19 probability of overdiagnosis, identification
20 through screening of tumors with little to no
21 clinical significance, argue strongly against
22 immediate acceptance of this new test into
23 clinical practice.
24 It goes on to say that:

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1 Before spiral CT is accepted into medical
2 practice, it is critical to determine whether
3 this modality does more good than harm in a
4 randomized controlled trial with lung cancer
5 mortality as the end point.
6 Is that correct, sir? Did I read that
7 correctly?
8 A. Yes.
9 THE COURT: Well, you didn't.
10 MR. NEWBOLD: I didn't? Before spiral --
11 THE COURT: It's not clinical practice. You
12 said clinical, but it's medical.
13 MR. NEWBOLD: I'm sorry, sir.
14 THE COURT: Mr. Klein attempted to correct you,
15 and you weren't listening.
16 MR. KLEIN: He never does.
17 MR. NEWBOLD: I always listen to Mr. Klein. I
18 just couldn't hear him.
19 Would you turn to the last page of the article,
20 please. I want you to highlight this whole thing,
21 Toward this goal.
22 BY MR. NEWBOLD:
23 Q. Now, these are the tests, Doctor, that the
24 NCI is in the process of running right now today, as
2532
1 we speak, to determine whether or not CT scanning
2 for cancer, which the plaintiffs are recommending,
3 makes sense. And the NCI is saying:
4 Toward this goal, the NCI is implementing
5 the lung screening study in which approximately
6 three thousand individuals aged 55 to 74 are
7 randomized to either chest x-ray or spiral CT.
8 Screening is performed once at study entry, and
9 follow-up is for one year, during which
10 compliance rates, contamination rates, cancer
11 detection rates, and the spectrum of diagnostic
12 procedures which follow a positive screen will
13 be ascertained. This information should
14 provide important background for the design of
15 a full-scale trial of spiral CT
16 So this is what the NCI is doing right now; is
17 that correct, sir?
18 A. That's right. And they are a bit tardy,
19 because other groups have gone beyond this study.
20 Q. Right, thank you, sir. But I'm asking
21 you: The National Cancer Institute, these are the
22 tests that they are doing right now?
23 MR. NEWBOLD: Would you put that back on the
24 screen for me, Jason? Blow up that last paragraph.
2533
1 BY MR. NEWBOLD:
2 Q. So one of the reasons that public health
3 organizations take time in order to get it right is,
4 not only do they get everybody's ideas, but they
5 also run actual clinical trials to see if it works.
6 In other words, they test the procedure before they
7 put it into operation; right?
8 A. They get groups in the country to do the
9 procedures.
10 Q. Who do that?
11 A. That's right.
12 Q. And what they are going to do -- before
13 they would just come out and automatically say let's

14 screen 270,000 West Virginians, what they are going
15 to do first, they are going to take a look at 3,000
16 individuals aged 55 to 74 and take a look at this
17 and to see whether it really works. Isn't that
18 right, Doctor?

19 A. That's what they are say they are going to
20 do.

21 Q. And that takes some time, doesn't it, sir?

22 A. Yes.

23 MR. FURR: Your Honor, may I consult with

24 Mr. Newbold?

2534

1 THE COURT: Yes.

2 (Off-the-record discussion)

3 BY MR. NEWBOLD:

4 Q. Now, doctor, you keep saying that perhaps
5 the NCI is a little tardy and other people have
6 already started doing some stuff. Now, the NCI is
7 aware of the other studies that have been done,
8 wouldn't you agree, sir?

9 A. They have been, yes.

10 Q. That's right. And so they are aware of
11 that data, and even though they are aware of that
12 data, they have decided they have to run this test
13 to assure themselves to make sure that they get it
14 right and make the appropriate recommendation?

15 A. Well, there are times when fields get
16 transformed, and, for example, their comment that
17 they are going to do a randomized clinical trial,
18 you know, there isn't going to be a complete
19 randomized clinical trial any more because both
20 x-rays and spiral CTs are so important for early
21 detection that randomization can't really take
22 place.

23 Q. Are you saying both chest x-rays and spiral
24 CTs are important for early detection?

2535

1 A. Yes, yes.

2 Q. Okay. And you are aware, of course, that
3 the plaintiffs in this case are not recommending
4 chest x-rays for their medical monitoring?

5 A. That's right. They are recommending a more
6 advanced form, a spiral CT.

7 Q. I thought you said that both chest x-rays
8 and spiral CTs are necessary?

9 A. I said chest x-rays can be valuable, but
10 not as valuable as spiral CT.

11 Q. And the NCI hasn't yet decided that spiral
12 CTs is a proper way to go until they conclude these
13 tests on these people; is that correct, sir?

14 That's what they are doing. But I'm suggesting
15 that fields get transformed and technologies for
16 doing studies move more rapidly than they are
17 proposing to do.

18 Q. Doctor, you've testified in a lot of cases,
19 and it's fair to say that you are interested in
20 getting people to quit smoking; right?

21 A. Well, I would prefer that they not start.

22 Q. Okay. Not start or quit.

23 And in fact, you support policies that would
24 make cigarettes more expensive so that fewer people

2536

1 would smoke?

2 A. Well, if public officials think that that's
3 a wise thing to do, I would support it, yes.

4 Q. You would support that, wouldn't you?

5 A. Yes. I would support anything that
6 discourages people from smoking.

7 Q. As a matter of fact, you testified in the
8 past that, if a prohibition against smoking would
9 work, that you would -- that you don't believe that
10 adults should even have a choice to smoke?

11 A. I never said they shouldn't have a choice.

12 Q. Did you say, sir, that, if I thought that
13 prohibition would work, I would be against their
14 having a choice. You never said that?

15 A. Yeah, but I never thought it would work.

16 MR. NEWBOLD: Would you put up the Engle
17 deposition at Page 33, Lines 15 to 20.

18 BY MR. NEWBOLD:

19 Q. Wasn't this your answer, sir:

20 Yes. I would say that they ought to have
21 a choice, although, if I thought prohibition
22 would work, I would be against their having a
23 choice, but under the circumstances, yes.
24 If you thought prohibition would work, you

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1 would be for prohibition; right?

2 A. But I don't think it would work. So you
3 are in a tautology. I said people should have a
4 choice, and I mean they should have a choice, and I
5 said I didn't think prohibition would work.

6 But I would call your attention to a great
7 public health experiment that we had in connection
8 with prohibition against drinking alcohol. It was a
9 great public health success, but it was a disaster
10 in other ways.

11 Q. So you think that it would be good for the
12 public health if all the American tobacco companies
13 would just go out of business?

14 A. Well, if they could and would, it would be
15 great for the public's health.

16 Q. Just that the tobacco companies just go out
17 of business, not sell cigarettes any more in the
18 United States?

19 A. Well, I think you are engaging in a
20 fantasy, but I would support your fantasy.

21 Q. Doctor, I want to talk to you now about
22 your 1979 Surgeon General's report and the Tobacco
23 Institute's having a press conference the day before
24 you released your 1979 report. Okay?

2538

1 A. All right.

2 Q. Now, the Tobacco Institute had an office in
3 Washington, D.C.?

4 A. That's correct.

5 Q. And industries in this country typically
6 have a trade association or an industry organization
7 to put forth their views; is that correct?

8 A. That's correct.

9 Q. And for example, the ads that you see or
10 that you used to see on the billboards with these
11 milk moustaches, that's from the milk industry or
12 the milk association putting those up; right?

13 A. That's correct.

14 Q. Even the people who raise and sell beef in

15 this country have an association to put forth their
16 viewpoint; is that correct, sir?

17 A. I think they do.

18 Q. Now, the tobacco industry includes not only
19 the manufacturers of cigarettes, but the people who
20 farm tobacco, sell tobacco, grow tobacco and sell it
21 at auctions to be made into cigarettes; is that
22 correct?

23 A. Yes, I assume that's correct.

24 Q. And as part of the responsibility of a
2539
1 trade association is to argue that side of an issue
2 that's beneficial to its members. That's what they
3 are there for; right?

4 A. I presume that's why they are there.

5 Q. And you don't deny they have a right, these
6 organizations, to express their opinion, do you?

7 A. No, I do not.

8 Q. And what these trade associations do is
9 legal in putting forth their members' position on
10 any particular issue; is that correct?

11 A. That's correct.

12 Q. All right.

13 A. But there is a difference between legality
14 and ethicality.

15 Q. Now, Doctor, I know you want to add some of
16 these things when I ask you a question, but
17 Mr. Segal will have an opportunity when I finish
18 asking you questions to ask you all the questions
19 that you would like to answer; okay?

20 Now, let's talk about what happened when you
21 were going to release your 1979 Surgeon General's
22 report.

23 You were scheduled to release it on January the
24 11th; right?

2540

1 A. That's correct.

2 Q. But the Tobacco Institute, the trade
3 association for the tobacco manufacturers, et
4 cetera, they had a press conference on January the
5 10th of 1979, one day earlier?

6 A. That's correct.

7 Q. Now, the goal of the Tobacco Institute was
8 to get the media to change public opinion about what
9 the public was thinking about the tobacco industry
10 in light of your Surgeon General's report that was
11 going to come out the next day?

12 A. Could you repeat that question?

13 Q. The goal -- let me rephrase the question.

14 The goal of the Tobacco Institute, by having a
15 press conference the day before you had your press
16 conference and your release, was to get their side
17 of the story out, to tell what they wanted to tell?

18 A. Well, it was a refutation of the science.

19 Q. But that's what they wanted, to get their
20 opinions out; right sir?

21 A. That's what they wanted to do.

22 Q. Okay. Now, they had their press
23 conference, and then you had your Surgeon General's
24 report and your release.

2541

1 Now, the tobacco industry in order to try to
2 get a fast read on, you know, who prevailed, the

3 tobacco industry, did their viewpoint prevail or did
4 the Surgeon General's viewpoint prevail, one way
5 that the tobacco industry would check into that
6 would be to read the newspapers on the next day to
7 see how it turned out. Would you agree with that,
8 sir?

9 A. That's correct.

10 Q. And isn't it a fact that the tobacco
11 industry immediately looked to see whether they were
12 successful in getting their point of view across?

13 A. I assume they did.

14 Q. Okay. Now, you are familiar with a man
15 named Mr. Kornegay. I believe there was a document
16 that was shown, Mr. Kornegay, he was the head of the
17 Tobacco Institute?

18 A. That's correct.

19 Q. Okay. And are you familiar with the fact
20 that Mr. Kornegay wrote a memo, and he talked about
21 whether or not his strategy of getting his viewpoint
22 across before your actual release. He wrote a
23 memo. And Mr. Kornegay said --

24 MR. NEWBOLD: Could you put up Tab 59, please.

2542

1 BY MR. NEWBOLD:

2 Q. Now, this is Mr. Kornegay, and he's
3 commenting on whether or not his plan on getting the
4 Tobacco Institute's viewpoint out over and above
5 your point was successful or not. And here is what
6 Mr. Kornegay said.

7 Editorial reaction, however, which is the
8 subject of this analysis, has been
9 overwhelmingly pro government, antismoking, and
10 particularly antinstitute.

11 Were you aware of that, sir.

12 A. Yes. But that's editorial reaction. That
13 doesn't refer to the amount of coverage that the
14 Tobacco Institute received in the media, which, by
15 their report, was much larger than the coverage that
16 we received.

17 Q. Isn't it a fact, sir, that editorials all
18 over the country not only rejected the message that
19 the Tobacco Institute had given, but ridiculed it?

20 A. Yes, and properly so.

21 Q. Now, your boss was Mr. Joseph Califano when
22 you were Surgeon General?

23 A. That's correct.

24 Q. And Joseph Califano, he was not a doctor,

2543

1 was he?

2 A. No.

3 Q. He was a lawyer?

4 A. He was a lawyer.

5 Q. He was a political appointee of Jimmy -- of
6 President Jimmy Carter?

7 A. That's correct.

8 Q. All right. And a couple -- isn't it a fact
9 that, a couple years after the 1979 press release,
10 that Joseph Califano wrote a book where he talked
11 about this entire event where the Tobacco Institute
12 had a press conference right before you had your
13 release. Do you recall that, sir?

14 A. That's correct.

15 Q. And that was a book that Joseph Califano

16 wrote called Governing America. Is that right, sir?
17 A. That's correct.
18 Q. Okay. And you've reviewed a copy of that
19 book; have you not, of the manuscript?
20 A. Yes, I did.
21 Q. And isn't it true that what Mr. Califano
22 said with the benefit of hindsight was that the
23 attacks that were being mounted by the Tobacco
24 Institute only had the effect of raising interest in

2544

1 the Surgeon General's report; isn't that correct,
2 sir?
3 A. Yes. In the process of getting more press
4 than we did, yes, the Tobacco Institute succeeded in
5 getting a lot of public attention drawn to the
6 issue; that's correct.
7 Q. But they actually raised interest in the
8 topic; isn't that correct, sir?
9 A. That was an unintended consequence of their
10 action, yes.
11 Q. But that's what happened, isn't it, it
12 raised interest?
13 A. It did, it did.

14 MR. NEWBOLD: Can we see Tab 199, please.
15 Page 194.

16 BY MR. NEWBOLD:

17 Q. So this is Governing America by Joseph
18 Califano, and he wrote. Can you below this up,
19 please.

20 On Wednesday, January 10, the Tobacco
21 Institute again attacked a report that had not
22 been published. Again, their actions raised
23 interest in the report.
24 Next quote.

2545

1 When Richmond and I walked into the press
2 conference on the morning of January 11, the
3 HEW auditorium was filled with more reporters
4 and cameras than on any occasion until I was to
5 meet the press after President Carter asked me
6 to resign.
7 Next?

8 The impact was stunning.
9 So that the -- actually, Doctor, you wrote --
10 you wrote a book yourself called Smoking and
11 Behavioural Sciences; is that correct, sir, or a
12 piece?

13 MR. NEWBOLD: Tab 57.

14 A. A book? No. It was a chapter, I think, in
15 a book.

16 Q. Okay. And what you wrote in 1980:

17 The documentation in connection with
18 smoking and health now is so firm that the
19 tobacco industry recognizes that trying to
20 attack it will no longer be a productive
21 exercise.

22 Is that what you wrote, sir?

23 A. Yes. I think it was too hopeful, but
24 that's what I wrote.

2546

1 Q. So isn't that the -- you can take that
2 down. Isn't that sort of the end of the story, and
3 that is that the Tobacco Institute had a press

4 release, and you released your Surgeon General's
5 report,

6 But the end result of all of that was that
7 because the Tobacco Institute had their press
8 release the day before, you got more attention, you
9 got more coverage, and your message was delivered
10 and received by even more people?

11 A. I think it's fair to say that that was the
12 unintended consequence of the Tobacco Institute,
13 because the distortions that it presented at its
14 press conference on January 10th were so widely
15 recognized by editorial writers as being dishonest
16 that it did serve to generate much more attention
17 than we had anticipated we would get.

18 Q. And in point of fact, it's true, is it not,
19 it turned out that in this year of the report, when
20 this report came out, there was a very significant
21 drop in cigarette consumption; is that correct?

22 A. That's correct.

23 Q. And in fact, secretary Califano took credit
24 for that and said that the drop of cigarette

2547

1 company -- that the drop in cigarette consumption
2 was directly attributable to the stunning success of
3 the 1979 report and the associated publicity; is
4 that true?

5 A. Well, that was his interpretation.

6 Q. You think otherwise --

7 A. But smoking had been declining since
8 Surgeon General Luther Terry's original report in
9 '64. So we accelerated the process, but it was not
10 as though smoking had not been declining before.

11 Q. Do you think that it was a reasonable
12 assumption that the decline in people who smoked was
13 attributable to the stunning success of your '79
14 report and the associated publicity?

15 A. Well, I think it would be immodest for me
16 to claim that, but it probably is true.

17 Q. When you testified recently, you said that
18 that was a reasonable assumption. Would you stand
19 with that today?

20 A. Yeah, as I say, I say it's a reasonable
21 assumption. In all modesty, I have to acknowledge
22 that would be true.

23 Q. You have to acknowledge that your '79
24 report was so successful that even more people

2548

1 stopped smoking?

2 A. That's correct.

3 Q. Now, Doctor, we have been talking about the
4 Frank Statement in this case now from the
5 beginning. Is it true to say that you can't
6 remember the first decade in which you actually read
7 the Frank Statement?

8 A. The first decade that I read it?

9 Q. Read it.

10 A. I'm not sure when I first first became
11 aware of it. It's been in the public domain since
12 1954.

13 Q. After sixty years of practicing medicine,
14 can you name anyone who at any time changed his
15 conduct in reliance on and because of the Frank
16 Statement?

17 A. I don't personally know of anyone.
18 Q. Now, Doctor, I would like to talk to you
19 about the Frank Statement and the Council for
20 Tobacco Research and the articles that the Council
21 for Tobacco Research has published; okay?
22 A. Yes.
23 Q. That's going to be the topic. You are
24 familiar with the Council for Tobacco Research?

2549

1 A. Yes, I am.
2 Q. And you understand that it's an
3 organization that provides money to people to
4 conduct research?
5 A. It did in the past. It's extinct now.
6 Q. It's no longer in existence, that's
7 correct.
8 And from time to time the CTR provided money to
9 institutions like the Harvard Medical School where
10 you teach; is that correct?
11 A. Yes.
12 Q. And from time to time, they have
13 co-sponsored research with government agencies?
14 A. That's correct.
15 Q. The people to whom the money was made
16 available by the Council for Tobacco Research were
17 independent scientists; is that correct, sir?
18 A. Well, I don't know whether that's
19 absolutely correct, but most of them were.
20 Q. Okay. And you would agree that there have
21 been literally thousands of publications that have
22 resulted from funding by the Council for Tobacco
23 Research?
24 A. That's correct.

2550

1 Q. Now, your 1979 Surgeon General's report was
2 prepared under your supervision and was rigorously
3 peer reviewed; is that correct?
4 A. That's correct.
5 Q. Okay. And there are a total of 57 articles
6 published by CTR funded researchers that were cited
7 in your 1979 Surgeon General's report?
8 A. I haven't counted them, but I would be
9 surprised if there weren't.
10 Q. And one of those studies done by the -- one
11 of the studies that was done by CTR research related
12 to the relationship between smoking and birth --
13 between smoking and birthweight in pregnant women;
14 is that correct, sir?
15 A. That's correct.
16 Q. And this was a study that was sponsored by
17 the CTR. It linked smoking and birthweight in
18 pregnant women, and it was published in various
19 medical journals in 1965; is that correct?
20 A. Approximately, yeah, I think that's right.
21 Q. And Doctor, you have testified in the past
22 that there were many studies funded by the tobacco
23 companies that reached conclusions that were adverse
24 to the companies; is that correct?

2551

1 A. That's correct.
2 Q. All right. And we know from the fact that
3 all of those studies made their way into some of the
4 most prestigious journals, medical journals, in the

5 world that the tobacco companies did not prevent
6 them from being published; is that correct, sir?
7 A. That's correct.
8 Q. And those peer reviewed --
9 A. I don't know whether they tried or not,
10 but --
11 Q. But they were published?
12 A. They were published.
13 Q. Those peer-reviewed articles were there for
14 anybody to interpret them anyway they wanted?
15 That's correct.
16 Q. Now, sir, I would like to talk to you about
17 another topic raised by Mr. Segal, and that has to
18 do with additives and whether or not the tobacco
19 companies gave the list of additives to the federal
20 government.
21 Now, you know, that the additives and the
22 flavorings are proprietary. They belong to the
23 companies, and they are various things they put in
24 cigarettes which make them different, one from

2552

1 another. You know that, don't you, sir?
2 A. Yes. I said that earlier.
3 Q. And when you requested -- when you
4 requested each cigarette company to tell you exactly
5 what was in each of their cigarettes, you understood
6 that that was proprietary information that the
7 cigarette companies would want to protect; is that
8 correct?
9 A. That's correct.
10 Q. All right. And for example -- another
11 example, a lot of people would like to know what's
12 in Coca-Cola so everybody could make Coke. That's a
13 proprietary formula; is it not, sir?
14 A. That's correct.
15 Q. And so that a lot of people would want to
16 know the exact recipe for how to make a Marlboro,
17 because Marlboro is the number one cigarette, and a
18 lot of people would like to be able to copy that; is
19 that right?
20 A. Well, that's right. But if Coca-Cola
21 caused lung cancer, we would want to know what's in
22 it, too.

23 Q. And I appreciate that, sir. And I realize,
24 once again, that I will ask you questions. I would

2553

1 like for you to give me your answers, and then the
2 way the system works is that Mr. Segal can then come
3 up, and he can ask you the questions so you can give
4 those answers to. But in order for us to move
5 along, you are simply going to have to answer my
6 questions; is that okay, sir?
7 A. I will do the best I can.
8 Q. What I really am getting at is that the
9 ingredients of a cigarette has a lot of commercial
10 sensitivity?
11 A. Yes.
12 Q. Okay. So that it was legitimate for the
13 cigarette companies to be concerned about giving you
14 the exact ingredients in their cigarettes, because
15 they were afraid that it might leak out somehow;
16 isn't that a legitimate concern?
17 A. But they were assured it wouldn't.

18 Q. I know. But there are leaks -- the federal
19 government does have leaks from time to time; does
20 it not, sir?

21 A. Well, I don't think the FDA has ever
22 leaked.

23 Q. The federal government has had leaks from
24 time to time, hasn't it, sir? We have all read

2554

1 about them in the newspaper.

2 A. That's a political discourse.

3 Q. In fact, the fact that what's in a
4 cigarette is proprietary and everyone is so
5 concerned about it that you actually brought a
6 lawyer with you when you met with the tobacco
7 companies to decide how this information might be
8 protected if it was disclosed?

9 A. But that was only because they sent their
10 legal firm; the Tobacco Institute provided its legal
11 firm.

12 Q. So they had a lawyer?

13 A. So I thought I should have legal counsel as
14 well.

15 Q. You both had your lawyers; correct?

16 A. That's right.

17 Q. And when you asked them to turn over all of
18 this stuff, they told you that they were concerned
19 about the problems with confidentiality; right?

20 A. Yes, and that they weren't going to share
21 their additives.

22 Q. I won't keep going on with this, but I need
23 to set the stage a little bit and go back to another
24 thing that Mr. Segal said.

2555

1 You actually wore two hats at the Department of
2 Health and Human Services. You were the Assistant
3 Secretary for health as well as the Surgeon General
4 of the United States; right?

5 A. That's correct.

6 Q. All right. And your term as the Assistant
7 Secretary ended on January the 20th of 1981. Is
8 that correct?

9 A. That's correct.

10 Q. And your term as Surgeon General ended
11 several months later, about the first of May of
12 1981. Is that correct?

13 A. That's correct.

14 Q. When your term as Assistant Secretary ended
15 on January 20th, Dr. Edward Brandt assumed that role
16 as Assistant Secretary for Health; is that correct?

17 A. I don't recall whether that was the precise
18 date in which he assumed that role, but he succeeded
19 me.

20 Q. But Dr. Brandt took your place, okay.

21 Now, your meeting with the companies regarding
22 the disclosure ingredients happened only a couple
23 weeks before your term as Assistant Secretary of
24 Health ended in January of 1981. Is that correct?

2556

1 A. That's correct.

2 Q. All right. Roughly four months before your
3 term ended as Surgeon General?

4 A. That's correct.

5 Q. All right. In fact, you met with the

6 representatives of the tobacco companies to discuss
7 these additives in midDecember of 1980. Do you
8 recall that meeting?

9 A. That's right.

10 Q. It's correct, isn't it, that, after
11 Dr. Brandt took over responsibilities as Assistant
12 Secretary of Health in January of 1981, he held
13 additional meetings with the tobacco company
14 representatives about identifying cigarette
15 additives and safeguarding this proprietary
16 information?

17 A. That's correct.

18 Q. All right. And he was ultimately
19 successful in concluding those negotiations; was he
20 not?

21 A. Well, he was successful only in getting the
22 list of additives. But he never could find out what
23 was in the cigarettes that were being smoked by the
24 American people.

2557

1 Q. The companies voluntarily turned over the
2 list. Is that correct, sir?

3 A. But it was a list of, I think, well over
4 two hundred compounds.

5 Q. A list of all the ingredients that are
6 contained in cigarettes; is that correct, sir?

7 A. No. Which might be contained in cigarettes.

8 Q. And this was the list that was requested by
9 your successor, Surgeon General Brandt; is that
10 correct, sir?

11 A. But he never got the listing of what was in
12 any given cigarette.

13 Q. Sir, are you telling me that they did not
14 comply with Dr. Brandt's request, your successor?

15 A. He negotiated to receive that list --

16 Q. No, I'm asking you a very specific
17 question: Did the tobacco companies comply with
18 Dr. Brandt's request?

19 A. In my view, not fully.

20 MR. NEWBOLD: Would you put up Blankenship
21 deposition September 19, 2000, Page 109, Line 16 to
22 18.

23 BY MR. NEWBOLD:

24 Q. Doctor, do you recall I asked you this

2558

1 question:

2 Is it your opinion that they did not
3 comply with Dr. Brandt's request?

4 And your answer was:

5 No, I think they complied with his
6 request.

7 Isn't that what you told me when I took your
8 deposition, sir

9 A. Yes. But I would add --

10 Q. Thank you, sir?

11 A. I would add not fully.

12 MR. NEWBOLD: Just answer your question.

13 MR. SEGAL: Your Honor, I object.

14 MR. NEWBOLD: Your lawyer will be able to ask
15 you other questions.

16 MR. SEGAL: I object.

17 THE COURT: I want to stop at this point and
18 ask the jury to go back to the jury room.

19 (In open court without a jury present:)
20 THE COURT: Let's get one thing straight, and I
21 didn't want to interrupt. Whoever is handling a
22 witness, it's not up to the person questioning the
23 witness to tell the witness what to do. You ask me
24 to tell the witness what to do. You don't have that
2559

1 role.

2 MR. NEWBOLD: Yes, sir.

3 THE COURT: My role is to keep the trial
4 moving. And if you want me to instruct the witness
5 to do anything, I will be happy to receive those
6 instructions and, when I think they are proper, I
7 will be happy to convey them. That's number one.
8 And that goes for everybody.

9 Now, in regard to, when you ask a rather tight
10 question on cross-examination, it requires a
11 specific answer. You can be seated.

12 The difficulty many times, particularly in
13 cross-examination, is that, when you do not keep
14 your question tight, it allows for some rambling.
15 And, you know, it takes -- you know, you have to use
16 some care to make sure that you don't permit the
17 rambling if in fact you don't want the rambling.

18 So on this specific question, the question was
19 tight and requires just a specific response, and, to
20 the extent that it needs to be developed further in
21 redirect, so be it.

22 That wasn't the case in some of the others.
23 They were rather open-ended questions, and one of
24 the -- one of the consequences of asking a rather
2560

1 broad question is that sometimes you get a -- you
2 know, it's the old aphorism: You ask a person the
3 time, and they tell you how to make a watch. So you
4 try to keep the questions rather tight.

5 But that depends on you. I mean, sometimes
6 it's going to happen. But each time you feel a
7 witness is going beyond the response, direct it to
8 me. Nobody has a right directly to instruct a
9 witness what to do. That's why I'm getting paid all
10 this money to do this. So just -- okay?

11 All right. Let's go and take about another
12 five minutes, let the jury relax a little bit, and
13 then we will pick up the examination.

14 MR. SEGAL: Your Honor, can I make one brief
15 request. When a witness is going to be cross-
16 examined with a document, pursuant to 106, may I be
17 permitted to see that document beforehand so that I
18 can raise with Your Honor the issue that there may
19 be a question or answer immediately before or after
20 it that the witness recalls that they gave that they
21 are trying to use contemporaneously with responding
22 to Lines 16 and 11? I would just like to be
23 provided that information.

24 THE COURT: You have every right, everybody
2561

1 does. Any time you are going to use a document, be
2 sure to show that document to the other side, and I
3 agree. I mean, there possibly are areas in which
4 you need to have a more expansive response in order
5 to get the full context.

6 So, yeah, I thought that's been done up until

7 now. Was it not done --
8 MR. SEGAL: I still don't have that article
9 they showed the jury. I don't know how I'm going to
10 do redirect on it.
11 THE COURT: Which article is that?
12 MR. SEGAL: NCI off the net. It had footnotes.
13 MR. NEWBOLD: You had that in Gaziano's cross.
14 THE COURT: Wait, wait, wait.
15 MR. NEWBOLD: Sorry, Your Honor.
16 THE COURT: All right. I presume those
17 documents had been turned over. They have not
18 been?
19 MR. SEGAL: Not with this witness.
20 THE COURT: Any document that being used should
21 be turned over. I mean, that's the way we have been
22 doing it. That comes as a surprise to me that it's
23 not. So --
24 MR. NEWBOLD: First of all, Your Honor, they
2562
1 have that document because I used it with Gaziano.
2 Secondly, the 48-hour rule I didn't think
3 applied to cross-examination.
4 MR. SEGAL: I'm not asking for it forty-eight
5 hours in advance.
6 THE COURT: That's not what he said.
7 MR. SEGAL: I'm saying, when it's tendered to
8 the witness, that I be given a copy.
9 THE COURT: And that is something I thought was
10 being done all along.
11 MR. NEWBOLD: I should have done that, Your
12 Honor, and I apologize to the Court.
13 THE COURT: All right. Let's just do it.
14 That's easy.
15 Now, Doctor, you want to keep walking around,
16 you can walk around, huh? You don't want to sit and
17 listen to all this palaver, do you?
18 (A recess is taken.)
19 (In open court with a jury present.)
20 THE COURT: Mr. Newbold, are you ready to
21 continue?
22 MR. NEWBOLD: Yes, Your Honor.
23 BY MR. NEWBOLD:
24 Q. Dr. Richmond, back to the question that I
2563
1 was asking before the break. Is it your opinion
2 that the tobacco industry did not comply with
3 Dr. Brand's request?
4 A. In my view, they complied in part.
5 Q. Doctor, you put in the "complied in part"
6 addition to your answer. When I took your
7 deposition, you didn't say that.
8 MR. NEWBOLD: Would you put it up on the
9 screen, please. This is Blankenship deposition,
10 Page 109, Lines 16 to 18.
11 BY MR. NEWBOLD:
12 Q. When I took your deposition, Doctor, I
13 asked you that exact question:
14 Is it your opinion they they did not
15 comply with Dr. Brandt's request?
16 And at that time, you simply said:
17 No, I think they complied with his
18 request.
19 Was that your answer at that time, sir?

20 A. It was.
21 Q. Thank you.
22 Now, after the list was provided by the tobacco
23 companies to the HEW, are you aware of HEW taking
24 issue with the list that had been submitted, saying
2564

1 we need more?
2 A. I don't recall.
3 Q. Doctor, when I took your deposition, your
4 answer was:
5 No, I'm not aware of anything like that.
6 If I were there, I would do it.
7 Was that your answer when I took your
8 deposition, sir?
9 A. Yes. I think that's compatible with what I
10 just said.
11 Q. Doctor, it's true, is it not, that at no
12 time has HEW come back and said that list shows that
13 there is a problem with the ingredients. HEW has
14 never said that; correct?
15 A. To the best of my knowledge.
16 Q. To the best of your knowledge, they have
17 not said that; is that correct?
18 A. That's correct.
19 Q. You know who Dr. Gori is, do you not, sir?
20 A. Yes, I do.
21 Q. And Dr. Gori was with the NCI; is that
22 correct, sir?
23 A. That's correct.
24 Q. In the 1970s, the National Cancer
2565

1 Institute, the NCI, sponsored something called the
2 Tobacco Working Group. Isn't that correct, sir?
3 A. That's correct.
4 Q. And that was a Department of Health,
5 Education and Welfare committee; right?
6 A. That's correct.
7 Q. In fact, Surgeon General Jessie Steinfeld
8 was a member of the Tobacco Working Group; is that
9 correct?
10 A. I think that was when he was still in the
11 National Cancer Institute.
12 Q. Okay. And members of the tobacco industry
13 were also on the Tobacco Working Group; is that
14 correct?
15 A. That's correct.
16 Q. And also some scientists who had done some
17 research in other areas on smoking and health; is
18 that correct, sir?
19 A. That's correct.
20 Q. And the purpose of the Tobacco Working
21 Group was to try to develop what the National Cancer
22 Institute described as a less hazardous cigarette;
23 is that correct?
24 A. No.
2566

1 Q. And what was the purpose of the TWG?
2 A. To share information and to review
3 scientific data concerning all aspects of smoking.
4 MR. NEWBOLD: Could I see the Dunn trial
5 transcript, please. May I approach the bench, Your
6 Honor.
7 THE COURT: Yeah, do you have it?

8 MR. SEGAL: Thank you.
9 MR. NEWBOLD: May I approach the bench?
10 THE COURT: Yes.
11 MR. NEWBOLD: May I approach the witness?
12 THE COURT: Yes, indeed.
13 BY MR. NEWBOLD:
14 Q. Directing your attention, sir, to Page 3357
15 -- actually start on Page 3356, Line 24, through
16 Page 3357, Line 20.
17 MR. NEWBOLD: Could you start at 3356, Lines 24
18 and 25, Jason.
19 BY MR. NEWBOLD:
20 Q. Now, about this same time, the National
21 Cancer Institute was sponsoring something -- go
22 up to the next page -- called the Tobacco
23 Working Group; isn't that right?
24 Answer: That's correct.

2567

1 Question: And that was a Department of Health,
2 Education and Welfare committee; right?
3 Answer: That's correct.
4 Question: That brought together members of the
5 government; right?
6 Answer: That's correct.
7 Question: Members of the tobacco industry?
8 Answer: That's correct.
9 Question: And some scientists who had done
10 some research in other areas in smoking and
11 health?
12 Answer: That's right.
13 And then the question I just asked you:
14 And the purpose of that was to try to
15 develop what the National Cancer Institute
16 described as a less hazardous cigarette; right?
17 And the answer was,
18 Answer: Yes, that's right.
19 Isn't that what you told me when your
20 deposition was taken, sir?
21 A. Yes. But that doesn't exclude other
22 appurtenances which were part of the working group's
23 responsibilities. That was one of its
24 responsibilities.

2568

1 Q. That was one of the responsibilities was --
2 of the Tobacco Working Group was to find -- was to
3 try to develop a less hazardous cigarette; yes?
4 A. That was one, yes.
5 Q. Is that correct?
6 A. And that's my answer.
7 Q. Now, Dr. Gori, Gio Gori, was a government
8 employee who worked with the National Cancer
9 Institute; is that correct, sir?
10 A. That's correct.
11 Q. And he had a smoking and health program
12 that spanned a period of years; is that correct, sir?
13 A. That's correct.
14 Q. And the Tobacco Working Group was part of
15 Dr. Gori's overall program; is that correct?
16 A. That's correct.
17 Q. It's true, is it not, that the Tobacco
18 Working Group safer-cigarette program, together with
19 those funded by the NIH resulted in the publication
20 of 490 peer-reviewed studies; is that correct, sir?

21 A. I have never counted them, but I would be
22 surprised if it wasn't a significant number.
23 Q. And those peer-reviewed studies tested a
24 whole series of different ways in which to modify
2569
1 cigarettes in order to make them safer; correct,
2 sir?
3 A. Well, those were some of the studies, but
4 there are many other studies.
5 Q. Now, you are not an expert yourself in the
6 area of cigarette design, are you, sir?
7 A. No, I am not.
8 Q. And you are not an expert in cigarette
9 manufacturing?
10 A. No, I am not.
11 Q. And you do not have any criticism of the
12 fact that the Tobacco Working Group was formed, do
13 you?
14 A. No, I don't.
15 Q. And you don't have any criticism over the
16 mission of the Tobacco Working Group of trying to
17 find a safe cigarette, do you?
18 A. No, I don't.
19 Q. Okay. And you don't have any criticisms of
20 Dr. Gori; is that correct, sir?
21 A. No, that's not correct.
22 Q. Sir, do you recall me taking your
23 deposition September the 19th, 2000? I think you
24 still have it, Page 178, Lines 1 to 8 and then 10 to
2570

1 12?
2 THE COURT: Which deposition is this?
3 MR. NEWBOLD: The Blankenship deposition.
4 May I approach the bench, Your Honor?
5 THE COURT: Yes.
6 MR. NEWBOLD: May I hand the witness his
7 deposition?
8 THE COURT: Yes.
9 BY MR. NEWBOLD:
10 Q. Directing your attention, sir, to the
11 deposition taken in this case on Page 178, beginning
12 at Line 1. Can you put that on the screen, please,
13 Page 178.
14 Question: Do you have any criticism of
15 the fact that the Tobacco Working Group was
16 formed?
17 Answer: No, no.
18 Question: Do you have any criticism over
19 the mission of the Tobacco Working Group of
20 trying to find a safe cigarette?
21 Answer: No.
22 Question on Line 10: Do you have any
23 criticism of Dr. Gori?
24 Answer: No, I just don't think it was a
2571

1 very effective effort.
2 Is that what you told me when I took your
3 deposition, sir?
4 A. Yes. And that's what I'm saying today.
5 Q. Thank you.
6 Now, Doctor, after you came on board as the
7 Assistant Secretary of Health and Surgeon General,
8 the Tobacco Working Group was disbanded by the HEW;

9 is that correct?
10 A. That's correct.
11 Q. And that was partly your decision and
12 partly our Secretary Califano's decision; is that
13 correct? It was a joint decision?
14 A. That's correct.
15 Q. And as a result of this decision to disband
16 the Tobacco Working Group, Dr. Gio Gori was
17 reassigned; is that correct, sir?
18 A. Yes. He was reassigned.
19 Q. And after 1979, the NCI's Smoking and
20 Health Programs' responsibilities for preparing
21 reports were transferred to your office on smoking
22 and health; is that correct?
23 A. That's correct.
24 Q. Doctor, the Tobacco Working Group was

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1 terminated because in your opinion it had run its
2 course; and that we knew there was no such thing as
3 a safe cigarette, and we thought it was an
4 appropriate time to terminate. Is that correct,
5 sir?
6 A. Well, I would go back to my earlier
7 comment, that it wasn't a very effective group at
8 that time.
9 Q. My question is, sir: The Tobacco Working
10 Group was terminated because in your opinion it had
11 run its course, and we knew that there is no such
12 thing as a safe cigarette, and we thought that it
13 was an appropriate time to terminate; is that
14 correct, sir?
15 A. As a public official, I thought that was my
16 responsibility, yes, sir.
17 Q. No such thing as a safe cigarette, and it
18 was time to terminate the Tobacco Working Group?
19 A. I also said it wasn't very effective.
20 Q. Right.
21 A. And as a public official, I had
22 responsibility to terminate it if it wasn't
23 effective.
24 Q. And at that time, the government, the

2573

1 United States government, shifted from trying to
2 develop a safe cigarette to putting an emphasis on
3 trying to get people to stop smoking or, if they
4 were smoking, to quit; is that correct?
5 A. Well, there was no deliberate day or time
6 at which a shift in policy occurred. We just felt
7 that effort was not effective; that is, the effort
8 to develop a safe cigarette. And we continued the
9 efforts.
10 The efforts to prevent smoking and to encourage
11 quitting were not new efforts. Those were ongoing
12 efforts. So there was no change in that policy, if
13 that's what you are inferring.
14 Q. So that you would stop, terminate the
15 Tobacco Working Group's efforts to create a safer
16 cigarette, and now the emphasis would continue to be
17 on either convincing people not to start smoking or,
18 if they were smoking, to quit?
19 A. That's correct.
20 Q. Okay. Now, Doctor, I'm going to be asking
21 you some questions about the changing cigarette

22 design. And I'm going to be asking you about
23 declining tar levels and nicotine levels in
24 cigarettes.

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1 And for the purposes of all these questions,
2 every time I ask you a question about declining tar
3 levels and nicotine levels, I want you to assume
4 that my questions are directed to tar levels and
5 nicotine levels as measured by the FTC machine.
6 Okay?

7 A. That's correct.

8 Q. Do you understand that?

9 The decline in tar and nicotine levels as
10 measured by the FTC that resulted -- that was a
11 result of important changes in cigarette production
12 and technology; isn't that correct? The decline in
13 tar and nicotine as measured by the FTC, that was a
14 result in important changes in cigarette production
15 and technology?

16 MR. SEGAL: Your Honor, I object. I move to
17 approach.

18 (At sidebar:)

19 MR. SEGAL: My objection is, beyond the scope.
20 I know Your Honor allows wide latitude, but I can't
21 figure out where in the world this goes.

22 THE COURT: It's definitely beyond the scope.

23 MR. NEWBOLD: I thought the objection was
24 because I crossed line.

2575

1 THE COURT: Don't be gunshy. It's just a
2 trial.

3 It is beyond the scope. And there is a couple
4 of ways of handling that. You know, one way to
5 handle that is, if you want to do that, you make him
6 your own witness.

7 MR. FURR: Well, I think we will just withdraw
8 this line of questioning.

9 MR. NEWBOLD: Yeah.

10 THE COURT: Fine.

11 (In open court:)

12 MR. NEWBOLD: I will withdraw that last
13 question.

14 THE COURT: All right.

15 BY MR. NEWBOLD:

16 Q. Doctor, when you were the Surgeon General,
17 you strongly advised people to quit smoking; is that
18 correct?

19 A. That's correct.

20 Q. It is your opinion that quitting smoking
21 has health benefits; is that correct?

22 A. Yes.

23 Q. It's true, is it not, that according to
24 the -- your Surgeon General's report, that

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1 ex-smokers, ten years after quitting, have mortality
2 rates which approximate those of nonsmokers? That's
3 what your 1979 Surgeon General's report said; is
4 that correct?

5 A. That's correct.

6 Q. Yes?

7 A. Yes.

8 Q. Would you agree with me that the best thing
9 for a person who does not have breathing problems

10 would be to either never start smoking or to stop
11 smoking?
12 A. That's correct.
13 Q. And if someone comes in with breathing
14 problems and is diagnosed with emphysema, the most
15 important thing that the person could do would be to
16 stop smoking; is that correct?
17 A. That's correct.
18 Q. In fact, there is really no cure for
19 emphysema except for the fact that, if you quit
20 smoking, you can arrest the development of the
21 disease; is that correct, sir?
22 A. In most cases, yes.
23 Q. So I take it, then, from your standpoint
24 that, with or without a bad spirometry test, your

2577

1 advice to everybody would be, if you don't smoke,
2 don't start; and if you smoke, stop?
3 A. That's correct.
4 Q. And that's advice that's given not only by
5 you, but by all of the public health organizations
6 as it pertains to smoking; is that correct?
7 A. That's correct.
8 MR. NEWBOLD: One moment, please, Your Honor.
9 THE COURT: All right.
10 BY MR. NEWBOLD:
11 Q. And I just want to make one other point,
12 Doctor, and that is, insofar as spirometry is
13 concerned, there is nothing new about spirometry;
14 it's been around for a long time; has it not?
15 A. That's correct.
16 Q. This is not a fast changing area in
17 medical -- in medicine, is it, Doctor?
18 A. No. That's a tried and true technology.
19 Q. And so when you testified, as you testified
20 earlier, that no public health organization
21 recommends spirometry for the early detection of
22 COPD, you said that with the knowledge that
23 spirometry has been around for a long time. Is that
24 correct, sir?

2578

1 A. Well, if you will pardon my different
2 interpretation of what I said, I said I was not
3 aware of whether public health organizations had
4 recommended that. So I was not aware of whether
5 they have or haven't.
6 Q. Well, sir, when I took your deposition two
7 months ago and you were under oath to give me your
8 opinions about the plaintiffs' medical monitoring
9 plan in this case, I take it that you had read all
10 of the various literature that was current at the
11 time when you were deposed two months ago; isn't
12 that correct, sir?
13 A. Well, I wouldn't say that I had read
14 everything. I've read many things since.
15 Q. I'm not talking -- I'm talking about when I
16 took your deposition and you had been endorsed by
17 the plaintiffs to give me your opinion on the
18 plaintiffs' medical monitoring plan, you prepared
19 yourself for that deposition that I took two months
20 ago by reading all of the literature that you needed
21 to read in order to give me a full and complete
22 opinion to help this Court and this jury make a

23 determination on these issues. That's what you did,
24 isn't it, sir?

2579

1 A. That's correct.

2 Q. Okay.

3 MR. NEWBOLD: No further questions, Your Honor.

4 THE COURT: Redirect examination.

5 MR. NEWBOLD: Excuse me, Mr. Segal.

6 MR. SEGAL: May it please the Court. Good
7 afternoon, folks.

8 -- -- --

9 REDIRECT EXAMINATION

10 BY MR. SEGAL:

11 Q. Well, Doctor, why don't we go to that
12 deposition from just a few months ago. Mr. Newbold
13 asked you some questions about CT scanning earlier
14 in your cross-examination. Do you recall that?

15 A. Yes, I do.

16 Q. And he asked you, well, didn't I ask you
17 this and didn't you answer this about CT scans. Do
18 you recall that, Doctor?

19 A. Yes.

20 Q. Would you be good enough, Doctor, please,
21 with me to turn to Page 81 of that deposition that
22 was taken just two months ago, as we have been told
23 several times. I believe it's the one July 16th,
24 2001, and it's on Page 81 that I want to ask you

2580

1 some questions about.

2 A. I'm not sure I got --

3 MR. SEGAL: Your Honor, may I approach since I
4 recognize the cover pages because I have been
5 through them?

6 MR. NEWBOLD: Your Honor, may I retrieve my
7 briefcase?

8 BY MR. SEGAL:

9 Q. Page 81 is the one I want to talk to you
10 about.

11 MR. NEWBOLD: Objection, Your Honor. May I
12 approach the bench?

13 THE COURT: All right.

14 (At sidebar:)

15 MR. FURR: Your Honor, our objection is as
16 follows: There is a mechanism for handling other
17 portions of his deposition, and that would have
18 been, under 106, to argue the parts of deposition
19 that should have been read in conjunction to that
20 which was read.

21 What Mr. Segal is doing now is an improper
22 redirect with respect to what he said in his
23 deposition. It's pure hearsay. He doesn't have to
24 do this. He can simply ask him about the

2581

1 substantive issue. If he was worried about part of
2 the deposition that should have been read at the
3 time that Mr. Newbold impeached the doctor, he
4 should have made that objection then. It's too late
5 to do it this way now.

6 MR. RODES: Your Honor, when Dr. Richmond
7 wished to call the jury's attention to other
8 pertinent parts of the same document, Mr. Newbold
9 told him in front of this jury that he had an
10 opportunity to do that with Mr. Segal on redirect.

11 And now they are trying to take that opportunity
12 away.
13 THE COURT: Listen, even before you came up
14 here, I had 106 down. The way to have done it
15 technically is to do it on a contemporaneous basis
16 and whatever portion was not read that should be
17 read in order to give it context is the way that it
18 should be done. And that is not hearsay under those
19 circumstances under State versus Gray.

20 All right. Now, so that's technically what
21 should have been done.

22 That's where we got into all this business
23 about how this witness was to answer and that
24 Mr. Segal can do it on redirect examination. And I
2582

1 was going to stop you at that point, but I didn't
2 know exactly how to do it because I don't want to do
3 anything in front of this jury that will be -- I
4 just don't want to make anybody look bad in front of
5 the jury if I can avoid it. That's just the way I
6 do things.

7 It should have been done that way.

8 MR. SEGAL: It will be in the future.

9 THE COURT: I'm going to permit you to do it.
10 How much of this are you going to do? Is this it?

11 MR. SEGAL: Yes.

12 THE COURT: All right. I appreciate that it
13 should have been done a different way. This whole
14 thing was handled a little bit -- maybe it was my
15 fault for not stepping in and doing what I should
16 have done under 106.

17 But I didn't.

18 MR. FURR: May I say something more, Your
19 Honor?

20 THE COURT: Sure.

21 MR. FURR: I appreciate the Court's ruling.
22 But, if that is the ruling, it seems to me that
23 rather rely on Mr. Rodes' representation, the doctor
24 was trying to get to some other portion of the
2583

1 deposition, I think was wrong.

2 Frequently I think he just wanted to add
3 something more. They should show us in the record a
4 specific point where, in fact, the doctor was trying
5 to get to the deposition and not simply add
6 something else he wanted to say before they use this
7 approach.

8 THE COURT: Well, number one, there are a
9 couple of answers to that. I mean, some of what you
10 are saying is exactly correct in the sense of
11 editorializing. I appreciate that. Others, there
12 was a portion -- whether this is it or not, I don't
13 know.

14 MR. FURR: I don't either.

15 THE COURT: Where it was another portion could
16 have been read under 106 and that would have
17 straightened out this whole thing.

18 We are now talking about Page 81.

19 MR. SEGAL: Yeah. There is going to be Line 6
20 through 23.

21 MR. FURR: Do you have it, Bill?

22 MR. NEWBOLD: Yeah, I have it.

23 MR. FURR: May I see it?

24 MR. RODES: Your Honor, one additional -- 2584

1 THE COURT: I'm going to permit you to do it.

2 Stop at that point.

3 MR. SEGAL: I will.

4 THE COURT: Your objection is --

5 MR. SEGAL: It's right there, Judge.

6 THE COURT: But from now on, if we are going to
7 do it that way, look at 106 and, if you have an
8 offer under 106, we will take it up. That way, it
9 makes it a lot easier for everybody.

10 (In open court:)

11 THE COURT: All right.

12 MR. SEGAL: Thank you.

13 BY MR. SEGAL:

14 Q. Did you get to Page 81, Dr. Richmond?

15 A. Yes, I did.

16 Q. If you would look at Line 6, I want to read
17 you a question you were asked in that deposition
18 just a few months ago.

19 Question: Now, you were asked a whole
20 bunch of questions about what public health
21 organizations ask and recommend. I want to ask
22 Dr. Richmond, based upon your experience and
23 training, some questions.

24 Based upon the state of the medical 2585

1 literature today, in your opinion, would sound
2 medical practice for people who have smoked
3 more than five years include a CT scan?

4 And would you please read the jury your answer
5 at that time, Doctor?

6 A. In my view it would.

7 Q. Next question:

8 And is that based upon all of the
9 literature which exists today that is in the
10 public domain and the scientific domain?
11 And your answer was?

12 A. Yes, it is.

13 Q. And the next question was:

14 And do you hold that opinion based upon a
15 reasonable degree of medical certainty and your
16 training in the area of public health?

17 A. Yes. And on the basis of the advances in
18 recent years in technology.

19 Q. And Doctor, is that exactly what you have
20 been here to say today in terms of the spiral CT
21 scan in that it can early detect disease and, for
22 that reason, it's a monitoring procedure that is
23 capable of early detection; correct?

24 A. That's correct. 2586

1 Q. Now, additionally you were shown a part of
2 an article by Mr. Newbold from the CancerNet. Did
3 he give you a copy of that?

4 A. I don't think I have a copy of it. It was
5 on the board.

6 Q. Yeah. Well, he put it up here, and one of
7 the things he said was, the NCI, before they
8 screened 270,000 West Virginians, they are doing a
9 study with three thousand people. Do you recall
10 those questions?

11 A. Yes.

12 Q. Well, those three thousand people, while
13 the West Virginians are sitting on the sidelines,
14 are all getting medical monitoring, aren't they,
15 Doctor, every one of those three thousand people is
16 getting a form of medical monitoring, aren't they?

17 A. That's correct.

18 Q. They are not leaving anyone on the
19 sidelines. You either get a chest x-ray or you get
20 a CT scan, but you get monitored under their study,
21 don't you, Doctor?

22 A. That's correct. That's why I said, the
23 field has been transformed. There can't be any true
24 control any longer.

2587

1 Q. And nobody in that -- nobody in that study
2 is being told, sit on the sidelines and don't get
3 medical monitoring, whether it be a chest x-ray or a
4 spiral CT scan; isn't that correct?

5 A. That's correct.

6 Q. And Doctor, in terms of that, is there any
7 reason that we in West Virginia need to wait for
8 this laborious process that you and Mr. Newbold
9 described for a long time to these folks, do we need
10 to wait for public health organizations to go
11 through that laborious process before we say it's a
12 good thing in West Virginia for people to receive?

13 MR. NEWBOLD: Objection, Your Honor.

14 BY MR. SEGAL:

15 Q. Medical --

16 MR. NEWBOLD: Objection, Your Honor.

17 THE COURT: Sustained.

18 BY MR. SEGAL:

19 Q. Doctor, is there any reason based upon your
20 training and experience in public health that in
21 West Virginia, okay, we cannot go forward and
22 medically monitor people who have been exposed to
23 cigarette smoke for more than five years?

24 A. No, I don't believe there is any basis.

2588

1 MR. NEWBOLD: Objection, Your Honor. It's
2 vague. Is it a legal conclusion he's asking him
3 for?

4 THE COURT: Objection will be overruled.

5 BY MR. SEGAL:

6 Q. Now, you were asked a whole bunch of
7 questions about Surgeon Generals' report in '64 and
8 '79 and the fact you all found these things and that
9 you found that there were causes of this disease,
10 and that was widely published, and then the Surgeon
11 General reports yearly after that.

12 Do you recall that line of questioning?

13 A. Yes.

14 Q. Up until the mid '90s, the mid '90s, did
15 any Surgeon General get approached by the tobacco
16 company and said, in an effort to safeguard public
17 health, we agree; we agreed with your conclusions?
18 Did any tobacco company ever do that?

19 A. No, they did not.

20 Q. Well, how do you cure the problem if you
21 don't admit you have a problem?

22 MR. NEWBOLD: Objection, Your Honor.

23 Argumentative.

24 THE COURT: Well, will be sustained. There is

1 another way of asking the question.

2 MR. SEGAL: Yes.

3 BY MR. SEGAL:

4 Q. Let me ask this. You were asked about the
5 Tobacco Working Group. Is it true, Dr. Richmond,
6 that the Tobacco Working Group, each member --
7 remember Mr. Newbold asked you weren't there members
8 from the cigarette industry on that; do you remember
9 that?

10 A. That's correct.

11 Q. Didn't each one of the members from the
12 tobacco companies who came to the Tobacco Working
13 Group also send a letter that said I'm not here as a
14 representative of a company; I'm here as an
15 individual?

16 A. Yes. They each wrote letters making that
17 point.

18 Q. And in addition to that, most of them wrote
19 letters making the point that they didn't even agree
20 that cigarettes were dangerous and needed to be made
21 safer, didn't they?

22 A. That's correct. And that's why I said, it
23 wasn't an effective group, because they wouldn't
24 even acknowledge that cigarette smoking caused

2590

1 disease.

2 Q. And by the way, are there some things about
3 Dr. Gori who they mentioned in your cross-
4 examination, since he left that group, that I
5 believe your comment was I do have some -- I don't
6 remember if it was concerning about him or
7 criticisms, I can't remember your exact word. But
8 is there something you learned about since he left
9 that group that concerned you?

10 A. Well, he went from the Public Health
11 Service to working for the industry, the tobacco
12 industry.

13 Q. So Dr. Gori, the head of the Tobacco
14 Working Group that Mr. Newbold questioned you about,
15 who was working for the Public Health Service when
16 the group got closed then went to work for the
17 industry?

18 A. That's correct.

19 Q. By the way, is it the government's job to
20 develop safer cigarettes?

21 A. Oh, I believe it's the industry's job.

22 Q. Should the taxpayers foot the bill for
23 having to develop safer cigarettes?

24 MR. NEWBOLD: Objection, Your Honor.

2591

1 Argumentative.

2 THE COURT: The objection will be sustained.

3 BY MR. SEGAL:

4 Q. Were the funds for the Tobacco Working
5 Group derived from taxpayer monies?

6 A. They were.

7 Q. And in your opinion, is it the
8 responsibility of the taxpayers to fund the
9 development of safer cigarettes, or is that the
10 industry's responsibility?

11 A. In my view, it's the industry's
12 responsibility.

13 Q. Oh, you were asked some questions about,
14 Dr. Richmond, the fact that the CTR funded thousands
15 of studies. My follow-up question to that is: Were
16 those thousands of studies all directed at the issue
17 of smoking and health?

18 A. No. They were on a variety of scientific
19 issues.

20 Q. And in your reports, only 57 of those
21 thousands of studies Mr. Newbold was talking about
22 even made it to the point of being quoted in the
23 report, or I think you said about 57; you weren't
24 sure of the exact number?

2592

1 A. Yes, I think that's correct.

2 Q. The head of HEW who came after you, I
3 apologize, I forgot his name. It was in the series
4 of questions you were about, well, didn't he get a
5 list that you didn't get, but you left your job and
6 then he got the list. Do you recall that series?

7 A. Dr. Brandt, yes.

8 Q. Dr. Brandt never got the information you
9 had requested in the letter which you showed the
10 jury earlier today, did he?

11 A. No. And the Public Health Service still
12 doesn't have the information I was requesting.

13 Q. Okay. Now, there was a mention of Coke and
14 trade secrets. Dr. Richmond, in your experience in
15 public health, surely the drug companies are very
16 protective of their patents and their drugs which
17 they create and then put on to the market, aren't
18 they?

19 A. That's correct.

20 Q. And not only do they have to turn the
21 formulas over to the federal government, but they
22 have to turn over any adverse incident reports, any
23 material which shows up in a study that was earlier
24 undetected; they have got to turn that all over to

2593

1 the government, don't they?

2 A. That's correct.

3 Q. And the Food and Drug Administration, the
4 people who make Coke, maybe they don't have to
5 provide the formula but they sure have to tell the
6 FDA what they put in those cans, don't they,
7 Dr. Richmond?

8 A. That's correct.

9 Q. And as we stand here today, the information
10 that you were concerned about on those issues to
11 protect public health was never turned over to HEW?

12 A. And it has not been to this date.

13 MR. SEGAL: All right. Give me a moment, if I
14 may, please.

15 THE COURT: All right.

16 MR. SEGAL: Your Honor, I would say I did a
17 pretty good job following all my little scratch
18 pads, so I'm done.

19 Thank you, Dr. Richmond.

20 THE COURT: Recross-examination.

21 MR. NEWBOLD: Yes, sir.

22 -- -- --

23 RE CROSS EXAMINATION

24 BY MR. NEWBOLD:

2594

1 Q. Dr. Richmond, there is nothing wrong with
2 somebody taking -- for Dr. Gori who used to be in
3 the National Cancer Institute, who used to work for
4 safer cigarettes, there is nothing wrong with him
5 then taking a job for the tobacco industry, is
6 there, sir?

7 A. No. I was just commenting that it's part
8 of the revolving door.

9 Q. Someone who worked for a safer cigarette
10 now works for the tobacco company?

11 A. That's correct.

12 Q. There is nothing wrong with that, is
13 there?

14 Okay. Doctor, you seem to be rather strong in
15 thinking that 270,000 West Virginians should go
16 through this screening program that the NCI doesn't
17 recommend and that the ALA doesn't recommend and
18 that the American Cancer Society does not recommend,
19 and the woman, Claudia Henschke, who actually sort
20 of started this test, doesn't recommend that
21 either. Are you aware of that, sir?

22 A. Well, I'm not aware that she doesn't
23 recommend it.

24 Q. You are not aware of that?

2595

1 A. No.

2 MR. NEWBOLD: Would you please put up Tab 60, I
3 think it is. Would you put up Tab 60, please.

4 MR. SEGAL: May I see it.

5 MR. NEWBOLD: It's the consensus statement of
6 the Society of Thoracic Radiology.

7 MR. SEGAL: Objection, beyond the scope.

8 MR. NEWBOLD: I don't think so, Your Honor.

9 THE COURT: Objection will be overruled.

10 MR. NEWBOLD: Put that up.

11 BY MR. NEWBOLD:

12 Q. Doctor, this is a 2001 -- blow this up,
13 please -- 2001 Journal of Thoracic Imaging, a
14 Consensus Statement of the Society of Thoracic
15 Radiology, Screening for Lung Cancer with Helical
16 Computed Tomography.

17 CAT scans.

18 One of the authors is Claudia Henschke, who I
19 am sure you recognize as the woman who was involved
20 in the ELCAP studies looking at whether helical CTs
21 should be used for screening.

22 Next, please.

23 Go up to the top, please, I want to see where
24 it says "summary."

2596

1 Summary.

2 Okay. Now, let's go down to the bottom.

3 It is the consensus of this committee
4 that mass screening for lung cancer with CT is
5 not currently advocated. Suitable subjects who
6 wish to participate should be encouraged to do
7 so in controlled trials, so that the value of
8 CT screening can be ascertained as soon as
9 possible.

10 That, Doctor, is what Claudia Henschke said
11 this year, and she recommends that it not be used
12 for screening purposes. Do you disagree with her,
13 sir?

14 A. Well --
15 Q. My question is: Do you disagree with her?
16 A. If you will pardon me, that says --
17 MR. NEWBOLD: Your Honor, may we approach the
18 bench?
19 A. That says this is a consensus. She didn't
20 write that herself. You are putting words in her
21 mouth. She was on that committee, and she is an
22 advocate for this. But in the committee, she didn't
23 prevail. So this is a consensus document, the likes
24 of which I was referring to earlier.

2597

1 MR. NEWBOLD: And would you show me the top of
2 it once again. I want to be sure everybody cease
3 their names up there. Blow that up.
4 A Consensus Statement of the Society for
5 Thoracic Radiology, Denise R. Aberle, Gordon
6 Gamsu, M.D., Claudia I. Henschke, M.D. and
7 Ph.D., David P. Naidich, M.D., Steven J.
8 Swensen, M.D. You may take it down, now.
9 BY MR. NEWBOLD:
10 Q. And Doctor, I want us to be very clear
11 here. You are no longer the Surgeon General of the
12 United States; is that correct, sir?
13 A. I think that's public knowledge.
14 Q. That's public knowledge. So your opinions
15 today are the opinions of Dr. Richmond?
16 A. That's correct.
17 Q. Not the opinions of the Surgeon General; is
18 that correct, sir?
19 A. That's correct.
20 Q. And you are not here to speak on behalf of
21 any public health organization, are you, sir?
22 A. No, I am not.
23 Q. You are here on your own, right, sir?
24 A. That's correct.

2598

1 Q. Now, Doctor, going to what you told me in
2 your deposition, Doctor, you had been deposed -- by
3 the time I deposed you two months ago, you had been
4 deposed numerous times; correct?
5 A. Well, it depends on what you mean by
6 numerous.
7 Q. Over five?
8 A. Five trials.
9 Q. Five trials?
10 A. That's all.
11 Q. You have been in many depositions?
12 A. Depositions relevant to the trials.
13 Q. And every deposition starts the same way, I
14 swear to tell the truth, the whole truth and nothing
15 but the truth so help me God; correct?
16 A. That's correct.
17 Q. And when I took your deposition, you raised
18 your right hand and you gave and swore the same
19 thing, right, sir?
20 A. That's correct.
21 Q. Okay.
22 MR. NEWBOLD: Please put up Blankenship
23 deposition July 16, 2001, Page 43, Lines 1 through
24 12.

2599

1 BY MR. NEWBOLD:

2 Q. Under oath, so help me God, I said:
3 What about spiral CTs? You didn't
4 mention that. Do you believe that there should
5 be spiral CTs or not?
6 Answer: Well, I think at this point,
7 until it's more clearly established, but that
8 field is moving so rapidly that, by the time
9 the plaintiffs were eligible for radiographic
10 screening, it might be that that would be an
11 accepted technique. It's under study right
12 now, and it's very promising.
13 Question: But at this time, you wouldn't
14 include that as part of the plaintiffs' medical
15 monitoring program?
16 Answer: No, I would not.
17 Is that what you told me, Dr. Richmond? That's
18 my question. Is that what you said to me under oath
19 two months ago.
20 A. It's here, and I said it under oath, and I
21 meant it.
22 Q. All right. And then we had a break, and,
23 after the break, Mr. Segal asked you the questions
24 that were read on Page 81; is that correct, sir,

2600

1 after the break?
2 A. I don't recall whether it was before or
3 after the break.
4 Q. It's on Page 81; is it not, sir? Your
5 answer to Mr. Segal gave you was on Page 81?
6 A. That's what we looked at a minute ago,
7 yes.
8 MR. NEWBOLD: Put up Page 72. Right here.
9 First, highlight Page 72, now go down here. Right
10 here, short recess.
11 BY MR. NEWBOLD:
12 Q. So you gave the first answer that you would
13 not include CTs before the break, and then, after
14 the break --
15 A. Well, if you will pardon me, I said it was
16 very promising.
17 Q. You did say it was very promising, and I
18 admit that. And I took that to mean there were
19 ongoing studies, and that it was very promising.
20 But at this time, you would not recommend it. And
21 that's what you meant; isn't it, sir?
22 A. That's right.
23 MR. NEWBOLD: No further questions.
24 MR. SEGAL: Your Honor, may we approach for one

2601

1 minute under 106?
2 THE COURT: All right.
3 (At sidebar:)
4 MR. SEGAL: Indicating?
5 THE COURT: What?
6 MR. SEGAL: I don't think it should be
7 suggested in front of the jury I violated the
8 Court's orders.
9 THE COURT: You mean in terms of that --
10 MR. SEGAL: He was asked the question.
11 MR. NEWBOLD: I didn't even say you were there.
12 THE COURT: There is no question about it.
13 MR. SEGAL: You suggested it in front of the
14 jury.

15 THE COURT: Okay. Your point is there was a
16 suggestion that, during the recess, you may have
17 attempted to rehabilitate the witness?
18 MR. SEGAL: Right, that I coached him.
19 THE COURT: You coached him?
20 MR. SEGAL: I have got you.
21 THE COURT: How do you want to handle it?
22 MR. SEGAL: I would have done it in recross but
23 I was afraid, after the last discussion --
24 THE COURT: How do you want me to do this?

2602

1 MR. SEGAL: I want to read this to the jury.
2 THE COURT: Which part?
3 MR. SEGAL: I haven't gotten to that point
4 yet. Short recess, read those words.
5 Are you ready, Dr. Richmond?
6 Yes.
7 We just returned from break. Did you
8 meet with your lawyers during the break, sir?
9 No.
10 You didn't talk to them.
11 No.

12 I just want to read that portion right there.
13 THE COURT: Yep, sure can. Sure can. In open
14 Court

15 -- -- --

16 FURTHER REDIRECT EXAMINATION

17 BY MR. SEGAL:

18 Q. Dr. Richmond, would you go to Page 47 of
19 that deposition, please?

20 A. Yes.

21 Q. On Page 47, at the top of the page, it
22 notes there was a short recess. Do you see that
23 right there on line eight, a short recess?

24 A. Yes.

2603

1 Q. Did Mr. Newbold after that --
2 MR. NEWBOLD: Excuse me, Your Honor. I think
3 we got the wrong page.
4 MR. FURR: We missed something here.
5 MR. NEWBOLD: May we approach?
6 THE COURT: All right.
7 (At sidebar:)
8 MR. FURR: My fault, Your Honor, I should have
9 caught this.
10 MR. NEWBOLD: Scott is right. I threw in the
11 wrong recess. That was the earlier recess. You are
12 right. I'm sorry, Judge.
13 MR. FURR: All right.
14 MR. NEWBOLD: Defendants withdraw the
15 objection.

16 (In open court:)

17 BY MR. SEGAL:

18 Q. Page 47, Line 8. It is noted there is a
19 short recess, correct, Dr. Richmond?

20 A. Yes, I see that.

21 Q. Then Mr. Newbold asked you. Are you ready,
22 Dr. Richmond, and you answered --

23 A. Yes.

24 Q. And then he said,

2604

1 We just returned from a break. Did you
2 meet with your lawyers during the break, sir?

3 And what was your answer?
4 A. No.
5 Q. You didn't talk with them?
6 A. No.
7 MR. SEGAL: That's all I had to read, Your
8 Honor.
9 THE COURT: All right.
10 MR. NEWBOLD: No further questions, Your Honor.
11 THE COURT: All right. May this witness now be
12 excused, not subject to recall?
13 MR. SEGAL: I would so request.
14 MR. NEWBOLD: Yes, sir.
15 THE COURT: Thank you very much, sir. You may
16 be excused.
17 All right. Let's take -- we can take two
18 breaks in the afternoon, can't we. Is that all
19 right with you? Okay.
20 (A recess is taken.)
21 (In open court without a jury present:)
22 THE COURT: Okay. Be seated.
23 Brenda gave me an outline of what is going on.
24 Basically another hour and a half?

2605

1 MR. BAKER: About that, Your Honor.
2 THE COURT: We have a juror that wants to be
3 excused at 4:45 that needs to go and pick up a
4 prescription that has to be -- so I want to
5 accommodate that. Where does that leave us in terms
6 of -- it's close.
7 MR. SEGAL: I think what we would like to do,
8 Judge, is work as hard as we can up to Myers, and
9 then we will give you the signal we have gotten as
10 far as we can go today --
11 THE COURT: Okay.
12 MR. SEGAL: -- because I believe it is mutually
13 agreed we should not split up Myers.
14 THE COURT: All right. That's fine. I will
15 tell the juror -- I already told her, frankly.
16 Let's bring them out.
17 I have these depositions from Dr. Richmond.
18 (In open court with a jury present.)
19 THE COURT: Okay. Be seated, please.
20 Ms. Hoover, we certainly will make sure that you are
21 accommodated.
22 PROSPECTIVE JUROR: Thank you.
23 THE COURT: Is everybody feeling all right
24 now?

2606

1 Okay. Mr. Baker?
2 MR. BAKER: Good afternoon, Your Honor.
3 Good afternoon.
4 Our next grouping is two documents in the Group
5 V and those two documents are 1189 and 4752. We
6 would move to admit those, Your Honor.
7 THE COURT: All right. Any further comment
8 beyond what has already been discussed?
9 MR. MILLER: Nothing further, Your Honor.
10 THE COURT: Those may be admitted into evidence
11 and made part of the record in this proceeding and
12 may be published and circulated to the jury at the
13 convenience counsel.
14 (The exhibits were so admitted.)
15 MR. BAKER: May I approach, Judge?

16 THE COURT: Yes.
17 MR. BAKER: The first document is a document
18 authored by Dr. James Mold, he had been a senior
19 researcher at Liggett.
20 The safer cigarette product developed at
21 Liggett & Myers, Inc.

22 What do we have?
23 A commercial quality cigarette of 8 to 12
24 milligrams tar with no carcinogenicity to mouse
2607

1 skin, tumourogenicity reduced by 95 to 100
2 percent. Reduced promoting activity of 50
3 percent was observed.
4 How is this accomplished?
5 These results were achieved through the
6 incorporation of palladium catalysts at a level
7 of 0.05 percent in tobacco with nitrate
8 nitrogen content of at least 0.75 percent.

9 Are there any drawbacks?
10 The cost of Palladium would require a
11 premium price of percent five to ten cents per
12 pack over conventional cigarettes.

13 Use of high nitrate tobaccos or
14 supplementing the natural level with magnesium
15 nitrate would produce levels of nitric oxide
16 and nitrosamines somewhat higher than is normal
17 for current best selling U.S. filter brands.
18 This has required selective filtration and/or
19 air dilution to effect a reduction of these
20 materials to normal levels. There are some
21 advantages in this, however, in that this
22 results in tar levels of 8 to 12 milligrams
23 with lowering of nicotine and many gas phase
24 constituent, CO, HCN, aldehydes, et cetera.

2608

1 This is responsible for a decreased
2 ciliotoxicity and cytotoxicity of the smoke.
3 What evidence exists for the reduction in
4 carcinogenicity?
5 The mouse skin data is based on 7 test
6 series including 26 different treated sample
7 cigarettes.

8 What evidence exists for the safety of
9 the product?

10 Chemical analysis as well as GLC profile
11 of the smoke has demonstrated there to be no
12 increase in any measured components.

13 Smoke inhalation studies in rats both in
14 a 30-day study and in a 24-month study have
15 demonstrated no increased toxicity for smoke
16 from treated cigarettes when compared to smoke
17 from a standard commercial cigarette.

18 Decreased cytotoxicity and ciliotoxicity
19 tests were obtained by standard biological test
20 method.

21 Analysis of the organs and carcass of
22 rats after 19 months inhalation was performed
23 by neutron activation. No palladium was found.
24 That concludes this document.

2609

1 THE COURT: All right.
2 MR. BAKER: The second document, Your Honor, is
3 4752. May I approach?

4 THE COURT: All right.

5 MR. BAKER: This is a 1985 Liggett & Meyer
6 report. At the top, you can see is labeled
7 privileged and confidential.

8 In 1968, L&M initiated a tobacco additive
9 program designed to reduce or eliminate the
10 tumourigenic activity of cigarette smoke. Once
11 the reduction in tumourigenicity was achieved,
12 the next step involved the development of a
13 commercially viable cigarette. The research
14 efforts were then directed toward the
15 compilation of evidence providing assurance
16 that the tobacco treatment would not introduce
17 any new or increased hazard to the smoker.

18 After evaluating more than two hundred
19 additives, the most effective treatment was
20 found to be the application of Palladium metal
21 and magnesium nitrate to tobacco blends. This
22 treatment reduced the incidence of tumors on
23 mouse skin by as much as 95 percent and the
24 incidence of mouse skin cancers by as much as

2610

1 100 percent.

2 Additional mouse skin painting tests have
3 further established the efficacy of the
4 Palladium treatment and have demonstrated its
5 applicability to a rather wide range of blend
6 compositions.

7 Cigarette smoke contains a number of
8 promoters which act in concert with other true
9 carcinogens to enhance the production of mouse
10 skin tumors. The Palladium treatment also
11 significantly reduces the cigarette smoke
12 promoting activity.

13 The presence of the nitrate in the
14 tobacco places certain limitations on the
15 finished cigarette. The major combustion
16 product associated with the nitrate is nitric
17 oxide. While there is no direct evidence that
18 this component is harmful at the levels present
19 in smoke, there is a body of opinion that
20 questions whether it may be detrimental to the
21 smoker. With this in mind, Liggett has
22 arbitrarily set a nitric oxide upper limit
23 equivalent to that present in the top ten best
24 selling U.S. brands.

2611

1 While there can be no argument that the
2 use of the additives has resulted in a product
3 with lower carcinogenic effects, it was
4 necessary to prove that the additives do not
5 introduce any hazard to the smoker. To this
6 end, Liggett has obtained extensive biological
7 and chemical evidence demonstrating that the
8 presence of the additives will not be
9 detrimental to the smoker.

10 In summary, L&M has developed a method of
11 treating tobacco which neutralizes cigarette
12 tar. Cigarettes have been produced in a tar
13 range of 8 to 12 milligrams which are believed
14 to be of commercial quality and which do not
15 demonstrate any new or increased hazard when
16 evaluated by extensive chemical and biological

17 tests.
18 XA scientific history.
19 Wynder, et al., reported that cigarette
20 smoke condensate could produce tumors on mouse
21 skin, 1953.
22 Liggett established contractual
23 arrangement with ADL, 1954.
24 Objectives: (1) determine validity of

2612

1 Wynder's study; (2) determine nature of
2 materials responsible for mouse skin
3 tumourigenic.
4 Results of Liggett/ADL research. (1)
5 Wynder's findings confirmed; (2) all domestic
6 commercial quality cigarettes produce
7 essentially the same incidence of mouse skin
8 tumors; (3) tumorigenic materials concentrated
9 in PCAH fraction.
10 Liggett initiates tobacco additive
11 program.
12 Objectives: (1) reduce mouse skin
13 tumourigenic; (2) develop commercially viable
14 cigarette; (3) ensure that tobacco treatment
15 does not introduce hazard to smoker.
16 Tobacco additive research program: (1)
17 development of a hierarchy of chemical tests
18 indicative or -- indicative of tumourigenic.
19 (2) evaluate additives chemical (3) perform
20 mouse skin painting tests.
21 Research program: (1) proved to be
22 difficult and time consuming; (2) required
23 expenditures of approximately 14 million
24 dollars.

2613

1 Reduction of mouse skin tumourigenic:
2 (1) most effective tobacco treatment is
3 Palladium enhanced by modest addition of
4 magnesium nitrate; (2) treatment eliminates as
5 much as 95 percent of CSC mouse skin
6 tumourigenic and as much as 100 percent of CSC
7 mouse skin carcinogenicity; (3), results have
8 been confirmed on all blends tested; (4)
9 treatment reduces CSC promoting activity.
10 Evidence that tobacco treatment does not
11 introduce hazard:
12 (1) chemical.
13 (a) no increase in levels of smoke
14 components;
15 (b) new compounds have not been
16 detected.
17 (2) biological:
18 (a) cytotoxicity;
19 (b) ciliotoxicity
20 (c) six week inhalation test
21 (d) chronic inhalation test
22 (e) PD was not detected in test
23 animals.
24 Summary: (1) cigarette tar has been

2614

1 neutralized;
2 (2) cigarettes in intermediate tar range
3 can be manufactured;
4 (3) no evidence for new or increased

5 hazard has been detected.
6 (a) can produce a commercially
7 acceptable low to midtar cigarette.
8 Justification: Manufacturing facilities
9 available. Taste acceptable to L&M
10 professionals.
11 (b) continuing supply of raw material
12 within acceptable price limits.
13 Justification: See discussion.
14 (1) problems.

2615

1 (a) legal: Any domestic activity
2 will increase risk of cancer litigation.
3 (3) conspiracy of L&M to withhold patent.
4 MR. BAKER: Those are the designations, Your
5 Honor.
6 MR. MILLER: There are counters, Your Honor.
7 THE COURT: Counters.
8 MR. MILLER: Your Honor, may I introduce myself
9 to the jury?
10 My name is Adam Miller and I assist Mr. Newbold
11 on behalf of Lorillard Tobacco Company.
12 The basic U.S. patent was issued in
13 October of 1977, and several supportive patents
14 are currently being processed. Foreign patent
15 applications have been filed, and the patents
16 have issued in several countries.
17 Justification: Technology proven on
18 mouse skin only.
19 Under discussion, governmental: (1)
20 U.S.A, HEW, FTC, FDA, NCI, Congress, state
21 legislators, courts;
22 (2) foreign, Hunter committee, et
23 cetera;
24 (3) special interest groups, ASH,

2616

1 ACS, lung.
2 (3) XA does not specifically address
3 Lung problem.
4 That completes this document, Your Honor.
5 THE COURT: All right.
6 MR. MILLER: Your Honor, at this time
7 defendants have additional counterdesignations.
8 THE COURT: All right.
9 MR. MILLER: Your Honor, may I approach with
10 RJR 8635?
11 THE COURT: Yes, sure.
12 MR. MILLER: This is a memorandum dated August
13 22, 1979. Jason, could we go to the very bottom.
14 This is from Liggett & Myers. And back to the top,
15 please.
16 This is to R.W. Hooker and J.H. Greer from J.
17 Bowen Ross, Jr., subject, Project XA Meeting with

18 R. J. Mulligan.
19 Attorney privileged, confidential.
20 A project XA review was held for
21 Mr. Mulligan on August 20, 1979, with Bob
22 Seidensticker, Art Toft, Butch Bryant, Bill
23 Hogeland, Bob Kersey and myself attending.
24 Based on negative FTC response, initiate
2617
1 lobbying activities by contacting the North
2 Carolina governor, senators and selected
3 representatives.
4 That completes that document, Your Honor.
5 MR. BAKER: No counters, Your Honor.
6 THE COURT: All right. Now, are you moving the
7 admission of that?
8 MR. MILLER: We are not at this time, Your
9 Honor.
10 THE COURT: All right.
11 MR. MILLER: Your Honor, may I approach with
12 RJR 8672?
13 THE COURT: Yes. Thank you.
14 MR. MILLER: This is a memorandum from the
15 Liggett & Myers Tobacco Company dated April 2, 1976,
16 to Mr. J.B. Ross from Dr. D. Mold. The subject is
17 meeting with Dr. Geogory at the National Cancer
18 Institute NCI on April 1, 1976.
19 Dr. Bates and I met for about one hour in
20 Dr. Gori's office for the purpose of requesting
21 that certain cigarette samples, containing our
22 catalyst, be included in the next series of
23 mouse skin painting tests to be carried out
24 under the auspices of the Lung Cancer Task
2618
1 Force of the NCI.
2 Dr. Gori raised the question of
3 nitrosamine levels, asking if we were aware of
4 this problem.
5 MR. MILLER: That completes the designation,
6 Your Honor.
7 THE COURT: All right.
8 MR. BAKER: No counters, Your Honor.
9 MR. MILLER: Your Honor, may I approach with
10 8707?
11 THE COURT: All right.
12 MR. MILLER: This is a memorandum from Liggett
13 & Myers Tobacco Company dated December 7, 1977. To
14 J.B. Ross from J.D. Mold. Subject, Dr. Kensler's
15 visit to NCI, 12-6-77.
16 Dr. Kensler made a visit to NCI and met
17 informally with Art Upton and Gio Gori. He
18 advised Upton of the development concerning
19 Palladium and nitrate additives. He mentioned
20 the issuance of the patent and the submission
21 of an abstract to be considered for
22 presentation at the AACR meeting. Upton seemed
23 to be impressed and asked if we had evaluated
24 the product by use of the Ames tests for
2619
1 mutagenicity. Kensler discussed the pros and
2 cons of this test with him, indicating that we
3 had attempted to carry out such a test but
4 found the response quite low and
5 nonreproducible. Further discussion included

6 the problems associated with marketing this
7 type of product in the face of FTC restrictions
8 and HEW's contention that tar is tar.
9 MR. BAKER: No counters, Your Honor.

10 THE COURT: All right.

11 MR. MILLER: Your Honor, may I approach with
12 RJR 8650?

13 THE COURT: All right.

14 MR. MILLER: This is a memorandum from the
15 Liggett & Myers Tobacco Company dated September 24,
16 1984, to R.L. Kersey from R.H. Wallick. Subject:
17 Some concerns regarding high nitrate level in XA
18 cigarettes.

19 Recent literature references have created
20 some concerns regarding the high nitrate levels
21 in the XA product. These published studies may
22 be brought to bear against Liggett & Myers
23 should the product be marketed in the future.

24 (1) A paper published by D. Hoffman,
2620

1 et al., Carcinogenesis, London, 5(2):221-224,
2 1984, gives smoke data on cigarettes to which
3 elevated level of nitrate, as sodium nitrate,
4 have been added. These data show as expected
5 from other earlier published work lowered
6 yields of tar, nicotine and benzo(a)pyrene, a
7 measure of PCAH content. However, he suggests
8 that higher levels of oxides of nitrogen and
9 N-nitrosamines may increase the, quote,
10 carcinogenic potential, unquote, of whole
11 smoke. He thus recommends that the, quote,
12 nitrate content of tobacco products should be
13 reduced, end quote

14 (2) A publication by Vello Norman, et
15 al., Lorillard, Beit. Tabakforsch, 12 (1983)
16 55-62, gives the effect of added nitrate as
17 magnesium nitrate on delivery of increased
18 levels of oxides of nitrogen and hydrogen
19 cyanide in cigarette smoke.

20 (3) Philip Morris, Inc., has been issued
21 a number of patents on methods for denitrating
22 tobacco, specifically in the preparation of
23 reconstituted sheet for cigarette use.

24 (4) recent papers have indicated a
2621

1 growing concern for levels of nitro-polycyclic
2 aromatics in air pollution, automotive
3 exhausts, and in tobacco smoke. Many of these
4 nitro-PAH compounds have been determined to be
5 highly carcinogenic, often more so than the
6 parent PAH. We have not looked for this class
7 of compounds in our smoke fractions, but I
8 would expect them to be present to a greater
9 extent in the high nitrate XA cigarette smoke.

10 I suggest that we do some studies on the
11 extraction, identification and quantification
12 of these compounds in our smoke fractions.

13 That concludes the designation, Your Honor.

14 MR. BAKER: No counters, Your Honor.

15 THE COURT: All right.

16 MR. MILLER: Your Honor, may I approach with
17 RJR 7131?

18 THE COURT: All right.

19 MR. MILLER: This is a letter from Arthur D.
20 Little, dated August 15, 1986.
21 To R. Herbert Wallick, Ph.D., manager, chemical
22 and analytical research, Liggett & Myers Tobacco
23 Company, Inc.
24 Enclosed is the report on the Ames assay

2622

1 mutagenicity results for the two sets of
2 cigarettes you sent. The key findings are that
3 Palladium and nitrate increase the level of
4 direct-acting mutagenicity in both sets.
5 That's signed by Andrew Siwak, Ph.D., vice
6 president, life sciences section.
7 That completes the designation, Your Honor.
8 THE COURT: All right.
9 MR. MILLER: Your Honor, may I approach with
10 RJR 8652.

11 This is an extra copy of the last one.
12 I promised that to her, Your Honor.
13 THE COURT: All right. Thank you.
14 MR. MILLER: Here is one with tabs, Your
15 Honor. It may be easier.

16 This is a memorandum produced by Liggett &
17 Myers.

18 (1) present paper at 12th international
19 cancer Congress.

20 (2) publish papers in preventive
21 medicine.

22 (3) press coverage. Popular articles
23 discussing question of PCAHs and mouse skin
24 results.

2623

1 (4) interviews, talk shows, discuss
2 invention.
3 Jason, there is a designation on -- there you
4 have it.

5 It will be difficult enough to dispel
6 arguments on safety of the product, we need not
7 make it easy for competition to discount the
8 importance of the discovery, as they can with a
9 PAH analysis.

10 In publishing the first paper, we can get
11 ourselves in a box. Firstly, by emphasizing
12 PAH reductions, we are obligated to show that

13 (1) PAH are important and responsible for
14 biological activity;

15 (2) that substituted are more important;
16 and (3) that we reduce the level by only

17 about 50 percent for a particular blend. But
18 the absolute level of PAH for treated product
19 is no different than commercial filter
20 cigarettes. Not only are we having to squirm
21 and present weak and surrepetitious arguments
22 in our first paper, which may give us problems
23 with the reference, but worse, even if we get
24 the paper accepted, it may haunt us down the

2624

1 way.

2 Competition can check PAH level within a
3 day or two of any report. It will become
4 apparent to them, as soon as they see any
5 numbers, that the leading commercial filter
6 cigarettes give essentially the same PAH

7 content as the new product. Visualize, if you
8 please, the PM announcement. Quote, Marlboro
9 cigarettes contain the same amount of PAH as
10 the new Tame. Results confirmed by NCI and
11 Faster D. Snell.

12 Due to declining sales, Liggett is
13 desperate and out of its mind, unquote. RJR
14 President Stich confirmed that PM announced
15 their Winston cigarette had the same content of
16 PAH as the new product. He has contacted
17 Governor Hunt of N.C. and Judge McGruder of
18 Greensboro, N.C., having been given evidence
19 that new product has same PAH content as
20 regular filter cigarettes. Judge McGrude has
21 issued an injunction against Liggett & Myers
22 restraining distribution and sale of Tame.
23 Liggett is appealing.

24 That concludes the designation on that

2625

1 document, Your Honor.

2 THE COURT: All right.

3 MR. MILLER: May I approach, Your Honor, LOR
4 10808.

5 THE COURT: All right.

6 MR. MILLER: This is a piece of correspondence
7 dated January 9, 1961, to Dr. H. B. Parmele, vice
8 president, director of research, P. Lorillard
9 Company, Inc.

10 Dear Dr. Parmele: Last July we received
11 four samples of experimental catalysts from
12 you. These samples were furnished by Englehard
13 industries, Inc., of Newark, New Jersey. The
14 sample containing carbon black and Palladium
15 has been tested by adding the mixture through
16 our regular RD control tobacco, preparing
17 cigarettes and collecting the tar.

18 The last Armour report which you
19 forwarded to me and which we received today
20 indicates that the Palladium, rather than
21 decreasing the benzpyrene content has increased
22 it substantially. That is, the value of the
23 control tar is about 1.3 units; whereas, the
24 Palladium treated products give a value of 1.75

2626

1 units. Thus, contrary to what the supplier
2 postulated, the addition of this catalyst,
3 which is characteristic of the group, increased
4 the polycyclic hydrocarbon in question rather
5 than decreased it.

6 It's signed by C. O. Jansen, research
7 supervisor, Lorillard Tobacco Company.

8 That concludes the designation on that
9 document, Your Honor.

10 THE COURT: All right.

11 MR. MILLER: Your Honor, may I approach with
12 LOR 11912?

13 THE COURT: All right.

14 MR. MILLER: This is a letter from the Armour
15 Research Foundation of Illinois Institute of
16 Technology dated January 3, 1961. This is to Dr. H.
17 B. Parmale, vice president, director of research,
18 P. Lorillard Company.

19 Dear Dr. Parmale: This report summarizes

20 the ARF results for eight tars analyzed since
21 the last report.
22 Tars analyzed during November and
23 December. Tar (a), 138 M, additive, 5 percent
24 Palladium on carbon.

2627

1 Discussion:

2 The benzopyrene results can be summarized
3 as follows: (1) it would appear that tar 138
4 M, Palladium on carbon, enhances the
5 concentration of benzopyrene in cigarette smoke
6 and is hence a poor additive.

7 That completes the designation on that one,
8 Your Honor.

9 THE COURT: All right.

10 MR. MILLER: Your Honor, I would like to
11 approach with RJR 5955?

12 THE COURT: All right.

13 MR. MILLER: This is interoffice
14 correspondence dated November 28, 1978, Philip
15 Morris, Incorporated. This is to Mr. Clifford H.
16 Goldsmith, from F.E. Resnick. Subject: L&M patent
17 on Palladium, No. 4,055,191.

18 The L&M patent on the addition of
19 Palladium to tobacco incorporated in cigarettes
20 is of no practical value for the following
21 reasons:

22 (1) Palladium alone is not effective.
23 The cigarette smoke condensate produced by the
24 addition of Palladium alone to the tobacco was

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1 not different from a control cigarette on mouse
2 skin painting tests.

3 (2). Palladium plus sodium nitrate is no
4 more effective than sodium nitrate alone. The
5 cigarette containing Palladium plus 3 percent
6 sodium nitrate showed an 89 percent reduction
7 in tumor incidence on mouse skin painting
8 tests. However, the addition of only sodium
9 nitrate by other experimenters have shown
10 similar results. Hoffman and Wynder, 8.3
11 percent sodium nitrate, 84 reduction in tumor
12 incidence, and Donten Will, 7.7 sodium nitrate,
13 66 percent reduction in tumor incidents.

14 (3). The addition of sodium nitrate adds
15 oxides of nitrogen to the smoke. The addition
16 of these quantities of sodium nitrate to
17 cigarette tobacco produces large amounts of
18 oxides of nitrogen in the smoke, which is
19 completely objectionable from the standpoint of
20 animal inhalation experiments.

21 That concludes the designation for this
22 document, Your Honor.

23 THE COURT: All right.

24 MR. MILLER: That concludes our

2629

1 counterdesignations, Your Honor.

2 THE COURT: All right.

3 MR. SEGAL: May it please the Court, you Your
4 Honor. We would like to read, Judge, at this time
5 Joel Robinson's testimony giving in Cipollone.
6 C-i-p-o-l-l-o-n-e, versus Liggett Group. The
7 testimony was given, Your Honor, on February the

8 18th, 1988.
9 THE COURT: All right.
10 MR. EVANS: Your Honor, may I approach the
11 witness stand?
12 THE COURT: Yes.
13 -- -- --
14 JOEL ROBINSON
15 being first duly sworn in deposition, testifies and
16 says as follows:
17 -- -- --
18 Q. Where do you live, sir?
19 A. In [DELETED].
20 Q. Are you being paid to attend this
21 proceeding here today?
22 A. Not at all.
23 Q. Mr. Robinson, can you tell the Court
24 and jury the nature of your business?

2630

1 A. The last eleven years, I have been an
2 inventor and developer of an automotive
3 accessory. Do you want me to go into detail?
4 Q. Tell us about that invention.
5 A. It turns out that, when you take
6 gasoline and you put it into a gasoline engine,
7 about two-thirds -- about 68 percent of the
8 fuel will burn inside that engine, creating hot
9 expanded gases that apply a pressure to the
10 piston that move the piston down.
11 That in turn is changed to a rotary
12 motion through the crankshaft, and that's what
13 moves the vehicle. And that's fine.
14 The drawback to the combustion of
15 gasoline in the engine the way it's taken place
16 over the last one hundred years is that
17 approximately one-third of the fuel, about 32
18 percent, leaves the engine without burning.
19 A small portion leaves in the form of
20 hydrocarbons, basically like gasoline, whose
21 temperature has been raised to be a vapor, but
22 has not entered any portion of the combustion
23 process.
24 The major portion of unburned fuel

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1 unreleased energy is carbon monoxide, which of
2 course we all recognize as being poison. Back
3 in the early '70s, in order to not have such an
4 enormous amount of carbon monoxide pollution,
5 our research has shown that -- we are talking
6 about four pounds of carbon monoxide leaving
7 the engine for each pound of gasoline entering
8 the engine -- the federal government ordered
9 that vehicles be made with something which is
10 called a catalytic converter.
11 A converter is really nothing more than a
12 muffler into which the exhaust gas is passed
13 after they leave the engine. What makes it
14 different from other mufflers is the fact that
15 the inside surfaces have been coated with
16 platinum, the precious metal.
17 The reason for doing this is that
18 platinum has a very unique characteristic when
19 unburned fuel such as carbon monoxide comes in
20 contact with platinum. Palladium is similar

21 but not as powerful. That's why platinum is
22 used in this particular instance; that unburned
23 fuel will now burn.

24 It will release its heat and energy, and
2632

1 it will become carbon dioxide, no longer be
2 polluted. The heat and energy which is
3 released inside the converter muffler cannot be
4 harnessed to drive the vehicle. It's simply
5 energy which is released but simply thrown away
6 through hotter exhaust gases which leave the
7 tailpipe.

8 However, now it's leaving the tail pipe
9 as burned fuel and therefore no longer
10 polluting. Back in 1977, I began the
11 development of an automotive accessory that
12 would actually introduce into the combustion
13 chambers of gasoline engines the effective but
14 economic quantity of platinum to enter the
15 combustion chambers with the air and with the
16 gasoline going into the engine so that the
17 platinum could be used to burn this fuel inside
18 the engine with a release of the heat and
19 energy could be harnessed to drive the
20 vehicle. So that, if you were going down the
21 highway at 40 miles an hour holding your foot
22 on the accelerator in a certain position
23 without the platinum, that, if you had
24 introduced platinum and held that pedal down to
2633

1 the same position, instead of going 40 miles an
2 hour, you would probably go 60 miles an hour.

3 Or, more likely the case, you wouldn't
4 push so far down on the accelerator pedal
5 because now you were releasing much more energy
6 from a smaller amount of fuel and capable of
7 performing the same task as before but with
8 less fuel, because you are utilizing more fuel
9 while it is in the combustion chambers of the
10 engine and this has been the work that -- the
11 development of this particular technology over
12 the eleven years.

13 Q. Do you have a business where you sell
14 these, what do you call them, automotive
15 accessories?

16 A. Platinum gas saver, and, yes, over
17 the course of the years we developed a business
18 where we manufacture and sell the product.

19 Q. Did there come a point in time where
20 you had a meeting with Mr. K. V. R. Day of
21 Liggett?

22 A. Yes.

23 Q. Tell the Court and the jury how that
24 meeting occurred?

2634

1 A. In 1980, the Consumer Protection
2 Authorities of the federal government felt that
3 our claim of 32 percent of fuel savings was
4 unreasonable, and began a five-year
5 administrative procedure which ended in July of
6 1985.

7 The final conclusion which actually came
8 out of the federal court system was that

9 independent testing had shown greater fuel
10 savings with our product than the 32 percent
11 that we were claiming, and that in fact there
12 was zero percent merit to the position of
13 Consumer Protection that anything that we had
14 said or claimed or done was anything less than
15 being absolutely correct.

16 As a result, under equal access to
17 justice reports, the Consumer Protection
18 Authority to reimburse us 100 percent of the
19 monies that it costs us to defend ourselves,
20 which came to a little over twenty-two thousand
21 dollars.

22 At that point we sent out a press release
23 talking about our product and talking about the
24 money that we had just received in July of

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1 1985, and that press release was picked up by
2 the newspaper, the Durham Sun in Durham, North
3 Carolina, where Liggett & Myers is located.

4 Q. Did you receive a phone call from
5 somebody at Liggett?

6 A. Yes. Shortly after I received a
7 phone call from, I believe its their production
8 manager, whose name escapes me, who ordered 24
9 of our units to see exactly how it worked. He
10 ordered 24, and evidently they worked quite
11 successfully.

12 And they arranged this meeting between
13 Mr. Dey and myself in Boston because they were
14 interested in looking for products that they
15 could market through a strict network which
16 they had already established.

17 Q. Did you meet with Mr. Dey in Boston?

18 A. Yes. It happened the day of the
19 hurricane, September 27, 1985. And we met at
20 the hotel which was -- at that time it was
21 called the Holiday Inn located in Newton,
22 Massachusetts.

23 Q. I think the question was: Can you
24 tell us what happened during the course of this

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1 meeting with Mr. Dey?

2 A. Certainly.

3 Q. Tell us whether or not anybody was
4 present other than Mr. Dey?

5 A. He brought with him I believe his
6 vice president of marketing, whose name escapes
7 me, and he brought along a junior in-house
8 attorney whose name escapes me. As I recall,
9 there were four of us at this particular
10 meeting.

11 Q. Tell us, basically, how the meeting
12 began and who said what.

13 A. Yes. The meeting basically began
14 with Mr. Dey, first of all, wishing to
15 introduce himself, which he did, and then he
16 went on quite unexpectedly to introduce his
17 experience with the use of the group of
18 platinum metals, platinum and Palladium, for
19 the purpose of enhancing or improving the
20 combustion process.

21 Q. What do you mean by combustion

22 process?
23 A. Certainly. I explained to you
24 earlier that combustion processes in general do
2637
1 not take place to completion. If you burn wood
2 in a wood stove, you only burn about 60 or 65
3 percent of the fuel. The rest goes up as
4 carbon monoxide and as other fuels that should
5 have burned but don't because conditions don't
6 permit the complete burning to take place.
7 In cigarettes it's the same, and one of
8 the most poisons or whether it be a cigarette,
9 gasoline or what have you, is the same way.
10 And Mr. Dey went on to explain that he,
11 himself, as part of Liggett & Myers, had had
12 personal experience with the use of it.
13 Q. Mr. Robinson, could you tell us what
14 Mr. Dey told you about his experience with
15 catalysts?
16 A. Yes. They had already had the
17 experience of employing some of our 24 products
18 to their own vehicles with great success. He
19 went on to explain to me the research Liggett &
20 Myers had done in this particular area.
21 He had mentioned there had been a
22 laboratory outside of Liggett & Myers that had
23 applied the smoke from the burning of cigarette
24 tobacco to the backs of mice and rats; and
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1 that, on a regular basis, it produced tumors.
2 They then read that they -- researchers
3 at Liggett & Myers -- studied those reports
4 very closely, that research very closely, and
5 then proceeded to do exactly the same testing
6 in their own laboratories and again were
7 successful in their laboratories.
8 And again, when they applied the smoke of
9 the cigarette tobacco to the backs of the mice
10 and the rats, again, they got tumors, just the
11 way this outside laboratory had been successful
12 in doing.
13 They either at that time or prior to that
14 time were working on making cigarettes where,
15 inside the tobacco itself, integral part of the
16 tobacco, there would be Palladium, which I
17 mentioned to you earlier, one of the group
18 platinum metals that looks like platinum, to
19 improve the combustion process so that you will
20 burn a much higher percentage of the fuel or in
21 this case the tobacco, which is the fuel.
22 He said, when they went to their
23 laboratories and when they applied the smoke
24 which came from these Palladium cigarettes,
2639
1 there was zero occurrence of the tumors on the
2 backs of these mice and rats, which made a
3 certain amount of sense.
4 I then asked him -- then he went on to
5 tell me they had, in fact, applied for and
6 received U.S. patents to produce such a
7 cigarette. I then asked Mr. Dey if, in fact,
8 they had produced such a cigarette and had
9 marketed such a cigarette to the general

10 public.
11 He said, no, they had not.
12 I asked him why they had not marketed it
13 to the public.
14 He said because to market such a
15 cigarette to the public would in effect make
16 the statement that all other cigarettes are
17 harmful to people's health.
18 Q. How long did the rest of the meeting
19 take?
20 A. The whole meeting took place perhaps
21 about an hour and a half.
22 Q. Did you meet again with Mr. Dey?
23 A. Yes. He invited us to visit their
24 facilities in Durham about a month or so later,
2640

1 which I did.
2 Q. Did you talk about the Palladium
3 cigarette when you were in Durham?
4 A. No.
5 Q. Never had another conversation about
6 it?
7 A. Correct.
8 MR. MILLER: There are counterdesignations,
9 Your Honor.
10 MS. GADDES: May I approach the witness stand?
11 THE COURT: Certainly.
12 Q. Mr. Robinson, isn't it a fact that,
13 in January of 1986, Mr. Dey advised you that
14 Liggett was not interested in your product
15 anymore; isn't that right?
16 A. That's true.
17 Q. And weren't you advised at that time
18 that the Liggett was of the belief that their
19 research laboratory and that their tests in
20 other vehicles in other research laboratory
21 tests and tests on other vehicles, they could
22 not find any satisfactory support to market
23 your product? You were advised of that in
24 January of 1986; is that right?

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1 A. I did receive a letter from Mr. Dey
2 which said they were not interested in pursuing
3 the marketing of our product. Whatever the
4 reasons they gave were immaterial.
5 Q. Isn't it a fact, Mr. Dey -- isn't it
6 a fact that Mr. Dey advised you in January of
7 1986 that, after doing appropriate tests both
8 in our research laboratory and in different
9 kinds of vehicles, we cannot find satisfactory
10 support from our viewpoint to market this
11 product? You were aware of that; is that
12 right?
13 A. Again, I repeat, I received a letter
14 from him to that effect. I am not arguing the
15 content of the letter. What I'm saying to you,
16 that I know very positive results up until
17 September of '85, and that's why the first
18 meeting took place.
19 Q. In any event, you were turned down by
20 Liggett in January of 1986?
21 A. They were not interested in marketing
22 my product. That statement is correct.

23 MR. MILLER: Thank you, Your Honor.
24 THE COURT: All right.

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1 THE COURT: Are we at the Wuffle (phonetic)
2 deposition?
3 MR. SEGAL: Meyer.
4 THE COURT: Or the Meyer deposition?
5 MR. SEGAL: We are at point where we don't have
6 anything else that will fit.
7 THE COURT: And that will take longer than a
8 half hour?
9 MR. SEGAL: It will indeed, Your Honor.
10 THE COURT: Well, that's it, then. We can
11 thank Ms. Hoover for -- let's adjourn for the
12 evening. We will return tomorrow morning at 8:30.
13 Please don't discuss the case among yourselves nor
14 permit anybody to discuss it with you.
15 I know you are not watching anything on
16 television concerning this matter. I have been
17 alerted something is going on in regard on public
18 television. Don't do it anyhow, but I'm
19 specifically -- you shouldn't do -- just don't do
20 anything that has to do with tobacco, cigarettes or
21 anything related to this case. That makes it
22 easier.
23 All right. Do you want to stick around and
24 discuss that matter we had this morning?

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1 MR. RODES: Yes.
2 THE COURT: Okay. Let's let the jury go home,
3 and then we will discuss that report.
4 (A recess is taken.)
5 (In open court without a jury present:)
6 THE COURT: All right, be seated, please.
7 All right. Let's take up the matter relating
8 to the motion to exclude the plaintiffs' proffered
9 Exhibit 75228.093, and 75228.094, that are referred
10 to generically as the Czech report and the apology.
11 MR. GADDES: Perhaps, since it's our motion, I
12 can go first, Your Honor.
13 THE COURT: Well, it's your motion.
14 MR. GADDES: Your Honor, this motion relates to
15 a report entitled "The Public Finance Balance of
16 Smoking in the Czech Republic." It's a report that
17 was prepared and written by Arthur D. Little,
18 International, which is obviously not a defendant in
19 the case. It was commissioned by a Czech affiliate
20 of Philip Morris, International, neither of whom are
21 defendants in this case. It relates to --
22 THE COURT: Tell me so that I understand, what
23 is the relationship between Philip Morris CR --
24 that's capital C, capital R, then little S little A

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1 period -- in the scheme of things?
2 MR. GADDES: Yes. As I understand it, Your
3 Honor, it's an indirect subsidiary of Philip Morris,
4 International, which is again a subsidiary of
5 Philip Morris Companies, Inc., the parent company in
6 New York, again, not a defendant in this case.
7 THE COURT: I realize that. I understand your
8 argument. I just want to see what the -- if we had
9 a chart, you have Philip Morris -- what's the parent
10 company, just Philip Morris?

11 MR. GADDES: Companies.
12 THE COURT: Companies. That would be on top.
13 And then you have various wholly-owned
14 subsidiaries. Is that it?
15 MR. GADDES: Yes, that's correct, Your Honor.
16 THE COURT: And is Philip Morris CR one of
17 those subsidiaries in an indirect way?
18 MR. GADDES: It's definitely in the chain, an
19 indirect subsidiary. And Philip Morris,
20 Incorporated, is obviously a subsidiary of
21 Philip Morris Companies.
22 THE COURT: Okay. MR. GADDES: The report,
23 Your Honor, relates to the public finance
24 implications of Czech Republic, not West Virginia,

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1 not even the United States.
2 The report was not released even in the Czech
3 Republic, where it was released, until this summer.
4 So the defendants' position it's irrelevant to the
5 conduct that's going to be at issue in this case or
6 the class members in this case.
7 In short, Your Honor, we believe it's the wrong
8 company, wrong smokers, wrong date and even wrong
9 country.
10 In addition to the relevance arguments, and we
11 would submit that there is no relevance here, Your
12 Honor, and therefore Your Honor doesn't have to get
13 to 403, but we believe there are some serious 403
14 problems.
15 Plaintiffs want to offer the report and the
16 apology by Philip Morris Companies to suggest that
17 the defendant here thinks there is some kind of
18 economical benefit from smoking-related deaths.
19 Plaintiffs clearly want to use that to inflame
20 the passions of the jury. I think a glance at the
21 press reports we attached can show the impact, the
22 potential impact, that evidence could have on the
23 jury.
24 And we don't just attach the press reports, as

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1 Mr. Rodes suggested, as the evidence of prejudice.
2 It shows the impact that this could have on the
3 jury, the reaction of the press.
4 Another reason, Your Honor, that we believe
5 their introduction of the Czech report can
6 degenerate into a side show here is, this is an
7 economic report written by economists for
8 economists.
9 And, given the high prejudice, defendants would
10 be on the horns of a dilemma. We would have to
11 explain the background to the report, not just the
12 regulatory background in Czechoslovakia, the
13 potential increases in excise taxes, but also the
14 economic theory underlying the report, including
15 getting into collateral matters, such as the same
16 theory being used by the United States Government in
17 preparation for reports when it was considering
18 excise taxes.
19 As to the plaintiffs response, if I can touch
20 briefly on that, Your Honor. I think their response
21 and our motions are ships passing in the night. I
22 don't think plaintiffs actually address the concerns
23 we had with the introduction of the Czech report,

24 the relevancy problems we had, wrong company, wrong
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1 country, wrong date.

2 What, rather, plaintiffs did was point to
3 counterdesignations defendants have made in
4 plaintiffs' own exhibits, and those counters relate
5 to taxes and employment in the industry.

6 We believe those are relevant pieces of
7 evidence for a number of reasons. Plaintiffs want
8 to take an assumption from that and turn those
9 counters into something they are not. They want to
10 argue that those counters and read into them a
11 suggestion that we are saying economic benefits to
12 society should be weighed against loss of life.

13 Nowhere, nowhere do those counters say that,
14 Your Honor. It's just not there. Plaintiffs do
15 argue that they need -- and I think need is a word
16 they use into their brief -- the Czech report to
17 respond to what they call public benefit evidence.

18 But I was in the courtroom, Your Honor, when
19 Dr. Farone talked about four hundred thousand
20 deaths, Dr. Gaziano talked about one out of six
21 Americans dying from cigarette-related disease, and
22 Mr. Segal in opening talked about 80 -- 87 percent
23 of lung cancer caused by cigarette smoking. It
24 didn't seem to me they needed a Czech report to

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1 start talking about the detrimental side of
2 cigarette smoking.

3 One final point that is raised in plaintiffs'
4 opposition brief, Your Honor. Is almost a throwaway
5 relating to Kip Viscusi, Professor Viscusi, and in
6 fact an article by him is referenced as a footnote
7 in the report.

8 I don't think there is a standard for
9 admissibility, Your Honor, or it affects the
10 evidentiary value of this.

11 THE COURT: Well, of course, it might come in,
12 might it not, in attempting to impeach or cross-
13 examine Viscusi, couldn't it?

14 MR. GADDES: We would argue not the Czech
15 report, Your Honor. I'm not sure what Dr. Viscusi
16 wrote, and we can deal with that when the matter
17 arises.

18 THE COURT: That's one way it could come in.
19 The other side of it, of course, is that -- I mean,
20 it is an extremely damaging and I would say highly
21 volatile piece of evidence in this case.

22 The other consideration beyond the
23 Philip Morris objection is, I realize all the
24 defendants are in this case generally in the same

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1 way. But the -- I mean, they are not -- I mean, you
2 are joined at the hip, but you are not -- it's not a
3 full body joining.

4 And the impact it will have on the other
5 defendants if it does come in is another
6 consideration, although you haven't -- the other
7 defendants haven't raised it.

8 But I'm sure the other defendants are just
9 joining in on Philip Morris' argument, and hopefully
10 that succeeds, and somehow, if that doesn't succeed,
11 then I suspect we will hear from the other

12 defendants.

13 And then the question is whether or not the
14 other -- the harm to the other defendants can be
15 somehow cured. I don't know.

16 That's a concern that I have, and it's one that
17 I've looked at in a variety of ways. And one of the
18 stratagems, I guess, used here that all four of the
19 tobacco companies felt it appropriate to present a
20 united defense, and there is nothing wrong with it.

21 At some point, I don't know, I don't know what
22 happens. But that's for another day.

23 I understand your argument.

24 Okay. I understand your argument. Mr. Rodes?

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1 Now, let me see, you want all documents, you
2 want the report, itself?

3 MR. RODES: Your Honor, we want to make a very
4 limited use of the report, itself.

5 THE COURT: Okay. Which portion of the
6 report?

7 MR. RODES: The report itself, we only want to
8 refer to enough of it, perhaps not reading any of
9 it, or reading a very selected part. We haven't
10 edited yet because we have been given a global
11 attack, but enough to make the apology make sense.

12 That's all we want to do is make context to
13 what the apology is saying. We think the apology is
14 important. The apology was issued in this country
15 and, although it was the parent company and not the
16 defendant here, it says all of us at Philip Morris
17 no matter where we work are extremely sorry for
18 this.

19 And I believe that a fair reading of that is
20 that the people who work for the company that's a
21 party here are sorry as well. And what they are
22 sorry for is the acknowledged terrible judgment and
23 disregard of human values exhibited by the argument
24 that's made in the Czech report.

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1 And it's the argument that matters; it's not
2 who it was made to. There is more than one thing
3 argued in the Czech report, but the basic
4 methodology of the Czech report is to say, on
5 balance, cigarette smoking is beneficial because
6 there are economic benefits to counterbalance those
7 troublesome diseases and such.

8 And we believe that that is a morally bankrupt
9 position, and we believe that it shows terrible
10 judgment. And that's going to be important in two
11 respects.

12 The first respect here is these Rule 106
13 counterdesignations. Now, we have accepted the
14 Court's ruling that material that's not responsive
15 to what was originally designated can be put in.

16 The material here is particularly
17 unresponsive. We have a number of documents that
18 make a reaffirmation of the Frank Statement --

19 THE COURT: I will short-circuit your
20 argument. I think it's relevant.

21 MR. RODES: All right.

22 THE COURT: I think that it's going to be
23 difficult to get the apology in without getting some
24 of the report. It's the 403 that is the argument.

1 I think clearly the defendants have opened this door
2 in regard to -- and has, in cross-examination, many
3 witnesses in terms of the economic aspects of the
4 impact this might have on them.

5 It is definitely relevant and, the fact that
6 it's a subsidiary of Philip Morris, that, I don't
7 think should keep it out. But it is really -- you
8 have to look at it under 403 in two areas.

9 One is obviously you have -- I mean, it is
10 without a doubt the most outrageous analysis that I
11 think I have -- I just can't imagine that it was
12 even published. I don't know what entered
13 somebody's mind to be able to make this kind of
14 analysis.

15 MR. RODES: Your Honor, we will come back to
16 that when we talk about Professor Viscusi because
17 that's not an afterthought.

18 THE COURT: And therein lies my -- the way I
19 see this. I think this very well may come in at the
20 appropriate time. I don't think it can or should
21 come in in the plaintiffs' case in chief.

22 It very well might come in in the cross-
23 examination of Dr. Viscusi or by way of impeachment
24 or some other way. Or it can come in by way of

1 rebuttal.

2 It is a piece of evidence that is just
3 dynamite. It is. And I understand full well the
4 rush by Philip Morris Companies to apologize. I
5 mean, it deserves an apology. It does.

6 And it was made. The apology was made, and it
7 was a rather straightforward apology. Whether or
8 not Philip Morris Companies knew about it and what
9 Arthur Little's relationship -- I mean, this thing
10 is just confusing as hell. It's almost Byzantine
11 what happens in Europe and what Arthur Little does.

12 Of course, Arthur Little, even though they are
13 not a party in this case, Arthur Little's name is
14 mentioned in different documents here. So I'm
15 really confused.

16 I think it's dangerous at this point to, first
17 off, the apology, Mr. Rodes, cannot come in unless
18 it's tethered to something. Otherwise, it just -- I
19 mean, it doesn't make a great deal of sense. So it
20 has to be tethered to really what it is they are
21 apologizing for.

22 MR. RODES: Yes.

23 THE COURT: And I don't know exactly what you
24 intend to do there. But I think you should be

1 working on that. But much of what -- you see,
2 Viscusi is being offered up here at least. Now,
3 they may take, maybe it will blunt Viscusi's direct
4 examination because one of the dangers I believe in
5 offering up Viscusi as an emphasis here is to open
6 up this kind of inquiry. But I just think that it
7 should come in only after at least -- at least after
8 Viscusi, maybe something else, but not as the
9 plaintiff -- not in the plaintiffs' case in chief.

10 MR. RODES: Your Honor, they are not done yet
11 in putting in this same argument into plaintiffs'
12 case in chief. We have another publication packet

13 where they have counterdesignated, once again, some
14 more documents that will make the same argument.

15 THE COURT: I might take another look at it. I
16 might take another look at it.

17 I think (A) if we can cross the threshold of
18 its relevance, I think it's relevant in this case.

19 I have a very, very difficult time at this
20 point seeing -- I mean, how -- the prejudicial
21 effect here is so -- it is just -- I mean, it's
22 dynamite.

23 You know why it's dynamite? Because it's
24 current.

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1 MR. RODES: Well, Your Honor, it's even more
2 current than this, because they are doing it today
3 in this trial. That's what's really dynamite. They
4 are coming in here despite the apology and doing it
5 again.

6 THE COURT: I appreciate all that, and we will
7 be able to get to that at the appropriate time.

8 I just would like to hear what Viscusi is going
9 to say. I know what the proffer is -- not the
10 proffer, but basically how he's endorsed in terms of
11 what he's being offered up for. And this may very
12 well come in directly at that point.

13 If it does, I mean, after he testifies, if he
14 does, then we will take it up again certainly at
15 that point.

16 If you are talking about other
17 counterdesignations that seem to now bring this into
18 maybe sharper focus, I will be happy to do it at
19 that time.

20 How do you plan, though -- what impact is it
21 going to have on the other defendants? What's your
22 argument to that?

23 MR. RODES: The argument there is we have an
24 acknowledgment that this type of argument, the whole

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1 genre is specious and immoral. It's specious and
2 immoral as to all of them, and they are all making
3 that type of argument.

4 Now, with regard to Viscusi --

5 THE COURT: Even in regard to this, I mean, you
6 are imputing -- I mean, this to me, not only is it
7 possibly immoral, it's just down right stupid. In
8 the climate of things right now, it is.

9 And how do you impute this conduct of
10 Philip Morris through one of its subsidiaries to the
11 other three defendants? That's what I really need
12 to know.

13 MR. RODES: May I have a moment, Your Honor?

14 THE COURT: Sure.

15 MR. RODES: Your Honor, certainly as to
16 Professor Viscusi, he's been designated by all of
17 the defendants as a witness, and he's really a
18 principal originator of this theory.

19 But in addition, Your Honor, with regard to the
20 argument that is being made to this jury that
21 economic benefits, high taxes and things like that
22 should be balanced against the injuries caused by
23 cigarettes, which despite counsel's assertion I
24 think is the only possible relevance to the matter

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1 that's being raised, and with regard to that
2 assertion, that assertion is being made by
3 designations that are on behalf of all of the
4 defendants in this case, and they are all on the
5 hook for those designations.

6 They are all making the argument that those
7 things are relevant, that the jury should consider
8 those as a counterbalance against the death and
9 misery that is caused by cigarettes, and that's the
10 thing that the apology is saying shows bad judgment
11 and bad morals.

12 THE COURT: That's an interesting point. I
13 mean, so basically what you are saying is until they
14 disavow, the other three companies basically disavow
15 that argument --

16 MR. RODES: Yes, Your Honor.

17 THE COURT: -- then they should be tarred with
18 the same brush?

19 MR. RODES: Exactly.

20 THE COURT: Wow. Okay.

21 MR. GADDES: Your Honor, just briefly on the
22 relevance points Mr. Rodes mentioned, there are many
23 reasons that we would put in designated evidence I
24 think given what plaintiffs put in this case.

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1 They have put on evidence that essentially the
2 industry should go out of business. They have
3 certainly implied that with evidence.

4 They have also talked about a conspiracy.

5 And I think we are entitled to show who is in
6 the industry, what's there, that it's a legal
7 product, that it's a regulated product.

8 As to the taxes, Your Honor, Dr. Farone has
9 talked about sales. We have seen documents that
10 have talked about a multibillion dollar industry.

11 And also, Your Honor, I think this is a natural
12 product, and I think we are entitled to show that
13 there are farmers involved and there are retailers
14 involved, not just the tobacco manufacturers.

15 THE COURT: You are absolutely right, you are
16 permitted to, and I have not denied you that
17 opportunity to do that. This is the counter-
18 argument to that, that's all it is. And I think
19 that's the relevance of it.

20 The question comes in is that is it -- is the
21 impact so prejudicial that it outweighs that
22 probative effect. And I think that's the only -- I
23 don't think there are other 403 -- I don't think it
24 would be misleading or confusing to the jury. It

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1 would be unfairly -- I think is the language in
2 403 -- prejudicial, if at all. But Viscusi may
3 change that dynamic.

4 MR. FURR: Your Honor, we understand, and
5 obviously what we need to do is more thoroughly
6 address for the Court how it impacts defendants.

7 You know, not to overdramatize this, there used
8 to be five of us here, now there are four because
9 the presence of one of them was depriving the rest
10 of us a fair trial. And that's the type of issue we
11 want to address before this comes in.

12 THE COURT: I understand that, and I expected
13 it to be made and I think it's a proper argument to

14 listen to, and there are two sides to it.
15 You are in agreement in terms of a common
16 defense in certain of these areas, and because of
17 that, does that mean that you are now going to have
18 imputed to you what may be considered to be what I
19 would call just really, just -- I don't know how to
20 describe this. I mean, it really is -- the English
21 language doesn't have a word for it. I mean, I --
22 and that's why I think it's so prejudicial.
23 So I'm going to at this point not permit the
24 plaintiffs at this point to present it in their case

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1 in chief. It may very well be used either in cross-
2 examination of, what is it, Dr. Viscusi?
3 MS. MCHENRY: Yes.
4 THE COURT: Or possibly in rebuttal. We will
5 take another look at it.
6 Now, that doesn't answer the question in regard
7 to how we are going to address the other defendants,
8 and I need to get some help on that, because I
9 certainly do not believe that -- I follow Mr. Rodes'
10 argument up to that point.
11 I don't think that the other three defendants
12 should be tarred with this same brush on this, on
13 this particular piece of evidence. In other areas,
14 I do agree that there is some commonality. I think
15 the consequence of that is, it will all be, really,
16 in the same boat. But this is just too tough.
17 Okay. So -- but what I need to see, though, is
18 at the very least, Mr. Rodes, if you could tell me
19 what portions of it -- now, you may not know now.
20 You might want to use all of it, depending upon what
21 Viscusi testifies to.
22 But assuming you were going to use it in
23 rebuttal, just tell me how you are going to do it,
24 what portions. I don't need to know it now, but at

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1 some point I will; okay?
2 All right. Now, is Dr. Burns going to be
3 testifying here this week?
4 MR. SEGAL: He is, Your Honor. Wednesday and
5 Thursday.
6 THE COURT: Okay, good. That's fine. Do we
7 need to do anything more in regard to his -- I
8 received something this morning in regard to
9 Dr. Burns. Mr. Evans?
10 MR. EVANS: Yes, Your Honor. There was a
11 document that was argued in one of the summer
12 document conferences. It was a list of additives.
13 Your Honor requested more specific information how
14 it would be used.
15 THE COURT: All right. I will be ready for
16 that. Okay, good.
17 Let's see. Is there anything else lingering?
18 Do we need to meet at 8:00 tomorrow?
19 MR. SEGAL: Plaintiffs don't have anything for
20 8:00 tomorrow.
21 THE COURT: Good. See you tomorrow morning at
22 8:30. Thank you all very much.
23 MR. SEGAL: Thank you, Your Honor.
24 (The hearing was adjourned at 4:48 p.m.)